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NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

In the Matter of ROBERT E. SYKES, dba FAMILY FUN-MOBILIVEN, Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Appeal No. A-21-72 Filed: August 22, 1972

Time and Place of Hearing:	July 19, 1972, 10:45 a.m. City Council Chambers City Hall 625 E. Santa Clara Street Ventura, California
For Appellant:	Robert L. Mezzetti Mezzetti & Testa 300 South First Street, Suite 210 San Jose, CA 95113
For Respondent:	Honorable Evelle J. Younger Attorney General By: John E. Barsell Deputy Attorney General

FINAL ORDER

Robert E. Sykes, dba Family Fun-Mobiliven, hereinafter referred to as "Sykes", filed an appeal with this board from a

decision of the Director of Motor Vehicles denying an application for a vehicle dealer's license. Because the administrative record raised a question concerning the board's jurisdiction to hear and decide the matter, the parties were given an opportunity to file with the board points and authorities on the jurisdictional question.

After reviewing such points and authorities and considering oral arguments of the parties, we conclude for the reasons discussed below that jurisdictional limitations imposed by the Legislature preclude us from hearing and deciding the merits of the Sykes' appeal.

FACTS

Sykes filed an Application for Occupational License with the Department of Motor Vehicles on July 30, 1970. Proceeding via the Administrative Procedure Act (Section 11500 et seq., Government Code), the director notified Sykes of the refusal to issue a vehicle dealers license. A hearing was conducted by an officer of the Office of Administrative Hearings on August 26, 1971. The Proposed Decision of the hearing officer recommended that the application filed by Sykes for a vehicle dealers license be denied, provided, however, that a probationary dealers license be issued for a period of two years subject to the condition that Sykes obey all of the laws of the State of California and all relevant rules and regulations of the

Department of Motor Vehicles. The proposed decision was not adopted by the department and a notice to this effect was filed by the department on November 24, 1971. On December 23, 1971, the Director of Motor Vehicles filed his decision which denied the application for a vehicle dealers license. Sykes timely filed an appeal to this board from such denial.

On or about June 23, 1972, which was four days prior to the date of his points and authorities filed with this board, Sykes filed another application with the Department of Motor Vehicles for an occupational license. In this instance, he indicated on the form that he was desirous of being licensed to sell "new Auto-Comm'l" and "new Trailer". He indicated that he was franchised by the International Recreational Corporation to sell Dreamliner Motor Homes. Further, Sykes submitted documentation that he did pay to the department the $30 fee pursuant to Section 11723 Vehicle Code and 13 Cal.Adm. Code 533. There is, however, nothing in the administrative record to indicate that the Department of Motor Vehicles has acted upon this application and Sykes concedes that the department has not so acted.

The points and authorities submitted by Sykes makes reference to a letter dated February 15, 1972, purporting to authorize him to sell Jayco Tent Trailers. A copy of this letter is a part of the record before us.

RELEVANT STATUTES

The jurisdiction of this board is circumscribed by Sections 3051 and 426 Vehicle Code as follows:

> "3051. The provisions of this chapter are not applicable to any person licensed as a manufacturer or transporter or salesman under Article 1 (commencing with Section 11700) of Chapter 4 of Division 5, or to any licensee thereunder who is not a new car dealer. The provisions of this chapter shall be applicable to a new car dealer or any person who applies for a license as, or becomes, a new car dealer as defined in Section 426."

> "426. 'New car dealer' is a dealer, as defined in Section 285, who, in addition to the requirements of that section, acquires for resale new and unregistered motor vehicles (excluding motorcycles as defined in Section 400 of this code) and new and unregistered trucks from manufacturers or distributors of such motor vehicles and trucks. No distinction shall be made, nor any different construction be given to the definition of 'new car dealer' and 'dealer' except for the application of the provisions of Chapter 5 (commencing with Section 3000) of Division 2 of this code, which chapter shall apply only to new car dealers as defined in this section."

CONCLUSIONS

It is apparent that the appeal filed by Sykes from the director's denial of the application of July 30, 1970, for a vehicle dealers license does not fall within the board's jurisdictional boundaries fixed by the Legislature.

Adverting to that application, we take note of three significant facts: (1) Sykes indicated thereon that the type of vehicles for which he desired a license to sell were "used Auto-Comm'l" and "used Trailer"; (2) Sykes entered no information in the place on the form provided for new vehicle dealer applicants to identify the franchisor; and (3) he did not submit with the application the $30 required of new car dealers

and applicants pursuant to Section 11723 Vehicle Code and 13 Cal.Adm. Code 533. Sykes did not file an application for a license to sell new and unregistered motor vehicles and the letter of February 15, 1972, purporting to authorize him to sell Jayco Tent Trailers did not place him in the new car dealer category. A trailer not being self-propelled (Section 630 Vehicle Code) is not a motor vehicle (Section 415).

Sykes informs us, however, that, "Under Section 3050(c)(3) Vehicle Code, there is no doubt that the board has jurisdiction over this question." He then proceeds to point out that he has filed another application with the Department of Motor Vehicles and that this is one for a license to conduct business as a new car dealer. Sykes has furnished us with a copy of this application and draws our attention to the fact that he has checked the appropriate box on the form and has paid the requisite fee. He argues "...there remains no doubt that [Sykes'] subsequent application for a New Car Dealers License now would enable the Board to exercise jurisdiction over the subsequent application." Appellant misconstrues the statutory scheme governing this board's functions.

Section 3050(b) Vehicle Code is the statute which confers upon this board the jurisdiction to hear and decide appeals

filed by new car dealers or applicants for a new car dealers license "from an action or decision of the Department of Motor Vehicles." Sections 3052 through 3058 Vehicle Code set forth procedural guides and other matters concerning appeals. We continue to construe, as we have during the past several years, Section 3050(c) as conferring jurisdiction upon this board to consider and resolve questions and complaints submitted to the board by citizens concerning activities of new car dealers or applicants for a new car dealers license; i. e. consumer complaints against new car dealer licensees. In our view, Section 3050(c) Vehicle Code has no relevancy to the board's appellate function and it does not confer upon the board "original" jurisdiction, concurrent with the jurisdiction of the department, to hear and decide accusations and statements of issues in proceedings conducted in accordance with the Administrative Procedure Act, Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code. Therefore, it follows that Section 3050(c) does not authorize us to take jurisdiction over the application filed June 23, 1972, not yet acted upon by the Director of Motor Vehicles. The "action" of the director from which the instant appeal is taken is the denial of a dealer's license following proceedings under the Administrative Procedure Act conducted with respect to appellant's application filed July 30, 1970. That appeal is all that is before the board at this time and it is beyond our jurisdiction.

The assertion of Sykes that we acquire jurisdiction of this matter on the grounds that the wrongful acts found by the department and forming the basis for denying a vehicle dealer's license occurred when Sykes was a new car dealer is hereby rejected as being totally without merit.

We now comment on the substantial length of time that has elapsed since Sykes filed his original application with the Department of Motor Vehicles. Approximately 13 months elapsed between the filing of the original application and the date of the hearing before the director's authorized representative. About four months elapsed between the date of such hearing and the date the director's decision was filed. Another five months passed between the filing of the appeal and the filing of the administrative record. One month elapsed between the last mentioned event and our hearing on the jurisdictional question. During these period of time, relevant circumstances may have changed. This board urges the Department of Motor Vehicles to conduct another investigation as expeditiously as possible so that the Director of Motor Vehicles may make a determination as to whether or not Sykes now has, in the director's judgment, the requisite qualifications for a license as a vehicle dealer. If the director should deny Sykes' second application of June 23, 1972, and assuming all other jurisdictional requisites are met, this board will have jurisdiction to hear and decide an appeal on its merits regarding that action of the director.

The appeal filed in the above-entitled case is hereby dismissed on the basis that jurisdiction is lacking. This dismissal shall become effective upon filing of this Final Order.

AUDREY B. JONES

PASCAL B. DILDAY

GILBERT D. ASHCOM

W. H. "Hal" McBRIDE

JOHN ONESIAN

ROBERT A. SMITH

WINFIELD J. TUTTLE

I dissent:

The answer to the jurisdictional question presented by this appeal must be found in the language of Sections 285, 426 and 3050, Vehicle Code.[1/]

Section 285, which defines "Dealer", is pertinent only in that appellant unquestionably has at all relevant times since filing his application of July 30, 1970, been an applicant for a license as a "dealer" as the latter term is therein defined.

Section 426, which defines "New car dealer", provides: "'New car dealer' is a dealer, as defined in Section 285, who, in addition to the requirements of that section, acquires for resale new and unregistered motor vehicles...and new an unregistered trucks from manufacturers or distributors of such motor vehicles and trucks." Section 426 further provides that no distinction is to be made, nor any different construction be given, to the definition of "New car dealer" and "dealer" except for the application of the provisions of Chapter 5 of Division 2, which govern this board and includes Section 3050. Finally, Section 426 provides that Chapter 5 "shall apply only to new car dealers as defined in this section".

Parenthetically, it should be noted that there is no reference whatsoever in either Section 285 or 426 to "an applicant for...a

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1/ Unless otherwise stated, all references are to the Vehicle Code.

license as a new car dealer as defined in section 426", the last quoted language appearing only in subsection (b) of Section 3050, which provides for the board's appeal power. If the closing phrase of Section 426 were taken literally and by itself, the board would have no jurisdiction over applicants for dealer licenses of any kind, and its jurisdiction would be limited to only those new car dealers who held a dealer's license prior to the occurrence of the event over which the board's jurisdiction is sought to be invoked. However, no one has thus far contended for such a restrictive interpretation of the language of Section 426 (and 285), doubtless because such a strict construction would render meaningless the provisions of subsections (b) and (c) of Section 3050 and of Section 3051 which were enacted at the same time as Section 426. Therefore, it seems reasonable to read the last clause of Section 426 to mean "which chapter shall apply only to new car dealers, as defined in this section, and to applicants for licenses as new car dealers".

It should be emphasized that Section 426 clearly provides that there is only one distinguishing feature of a new car dealer, namely, that he is a dealer who "acquires for resale new and unregistered motor vehicles...from manufacturers or distributors", and that this distinction shall have significance only with respect to the application of Chapter 5 governing this

board. It follows that, without any action whatsoever on the part of the department, or on anyone else's part, except a manufacturer or distributor, a dealer licensee can at the outset conduct his licensed business enterprise so that he is subject to this board's jurisdiction or not, at his whim, and that a licensed dealer who is not a "new car dealer" and thus not subject to the board's jurisdiction can also, at his whim, at any time, become subject to the jurisdiction of this board, without notice to or obtaining the consent of the department, merely by buying a new, unregistered vehicle, for resale, from a manufacturer or distributor. Thus, a dealer's action, unilateral and uncontrolled so far as the department is concerned, invokes the jurisdiction of the board. For the reasons hereinafter stated, I believe that the same is true of an applicant for a license as a dealer, except in the case of an applicant, the distinction depends solely on the applicant's intent, because, not having a dealer's license, an applicant cannot legally acquire for resale a new and unregistered vehicle from a manufacturer or distributor. The most he can do is declare it his intent to do so.

So far as the department and this board are concerned, the first occasion to inquire as to the existence or nonexistence of such intent is at the time the jurisdiction of the board is first sought to be invoked. That point of time, in the case of an

appeal to the board under subsection (b), Section 3050, is when the board receives an appellant's "appeal", in this case, the document entitled "Appeal from Order Denying Application for Vehicle Dealer's License" filed by appellant with the board January 19, 1972.

In the opening paragraph of his appeal document, appellant clearly and concisely declared the requisite intent when he identified himself as "an applicant for a new car dealer's license". Appellant has consistently maintained that position in the proceedings before this board. It is immaterial to his status and to the board's jurisdiction, that appellant did not declare himself an applicant for a license as a new car dealer at some earlier date, during the proceedings upon his application before the department, not only because it was not relevant to those proceedings whether he intended to buy and sell new and used cars, or only used cars, but also because of the specific provisions of Section 426 that the only distinction to be made between "new car dealer" and "dealer" is the application of Chapter 5 of Division 2. These provisions had no application or pertinence until appellant filed his appeal.

It is true that prior to filing his appeal with the board appellant did not declare his intent to acquire new cars for resale. Therefore, prior to filing the appeal, the board would

not have had jurisdiction to act with respect to appellant under the provisions of subsection (c) of Section 3050. However, that circumstance does not seem to be a proper basis for the board to refuse to entertain jurisdiction of this appeal. As discussed above, a licensee may assume or shed the status of "new car dealer" at his whim, with no formal or other control or action of the department as to whom he at all times remains merely a "dealer", except only with respect to the board's jurisdiction.

I find no justification for reading into these statutes language which is not there in order to deprive appellant access to the board. The majority held that in order to qualify as an applicant for a license as a new car dealer, appellant had to (1) declare his intent to act as a new car dealer when he filed his application with the department, (2) pay the $30.00 fee prescribed by Section 11723 and 13 Cal.Adm. Code §533, and (3) establish that he held a franchise from a manufacturer or distributor. It is extremely doubtful whether the third condition, if imposed by the state, would be constitutional; it has been held unconstitutional in other jurisdictions because if the state requires a franchise, it, in effect, delegates part of the state's licensing power to private enterprise.[2/]

2/ Subsection (c) of Section 11704 does not require that an applicant for a dealer license prove that the applicant holds a franchise. It merely requires the applicant to give the names of new cars for which a franchise has been granted as well as the names and addresses of the manufacturers or distributors who granted them.

Be that as it may, the legislature did not include these three elements in Sections 285 and 426. The majority's view does not find support in the language of subsection (b) of Section 3050. This language is, unfortunately, somewhat overly brief as it pertains to applicants, as distinguished from licensees. Moreover, the phrasing of the subsection is incorrect. One phrase is misplaced.[3/] The subsection, when reasonably interpreted, provides, in pertinent part, as follows: "The board shall: ... (b) Hear and consider ... an appeal presented by an applicant for ... a license as a new car dealer as defined in Section 426 ... when any such applicant submits such an appeal ... from an action or decision arising out of the department taken pursuant to Chapter 4 (commencing with Section 11700) of Division 5."

It was conceded by respondent, at oral argument upon the jurisdictional question, that had appellant indicated in his application of July 30, 1970, that he intended to acquire new cars from manufacturers or distributors for resale, paid the $30.00 "new car dealer's fee" and done whatever else the majority would require of him to attain the status of an applicant for a license as a new car dealer, the proceedings before the

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3/ An appeal is not presented pursuant to Chapter 4 of Division 5 as the phrasing of the subsection would indicate. Chapter 4 of Division 5 makes no provision for an appeal. The appeal is taken from an action or decision arising out of department action pursuant to Chapter 4 of Division 5. The proceedings before the department which lead to the actions appealed from are governed by Section 11708 which prescribes a hearing pursuant to Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code.

department which gave rise to this appeal would have been wholly unaffected. Specifically, respondent admitted that the procedure under the Government Code would have been identical. The same issues on the merits would have been presented. The same evidence would have been adduced at the hearing before the same referee. The same matters would have been considered by the referee in arriving at the proposed decision and by the director in arriving at his decision and his order denying petition for reconsideration. This, of course, is in keeping with the provision in Section 426 that, except as it affects the applicant's status with this board, there is no distinction to be drawn between applicants for dealer licenses and applicants for new car dealer licenses.

What then is gained by the position taken by the majority? Is the public interest served in some manner? Does common sense command the majority's conclusion, even though the statutory language doesn't support it? I submit that nothing has been gained. The public interest has been disregarded. Common sense is offended.

The majority properly recognizes that appellant has labored over-long before the department with his application. About thirteen months elapsed between filing the original application and the hearing and another four months elapsed awaiting the director's decision. Another five months went by after his

appeal was filed and before the administrative record was filed. Another month was spent preparing briefs and for hearing on the jurisdictional question. The board now has the administrative record, the parties are ready to proceed to hearing on the merits, appellant pleads, literally, that the board decide his appeal on the merits. Only the department objects, without presenting convincing reasons and certainly without showing how the public or even the department can be prejudiced.

In the face of these circumstances, the majority says that during the time that has passed, "relevant circumstances may have changed" (although there is no evidence to support this supposition) and that the department should "conduct another investigation as expeditiously as possible". I must ask, to what end? To enable the director to decide again what he has already decided unfavorably to appellant? The majority refers, presumably, to action by the department upon the second application of appellant filed June 23, 1972 -- one apparently meeting the majority's "new car dealer" test.

This case presents a sorry picture of a citizen's plight when involved in a bureaucratic jumble (or jungle) caused by statutes that are somewhat less than artfully drafted. The majority's decision places "form over substance" and the result is "justice delayed is justice denied". I realize that this board cannot "assume" jurisdiction, even if the

parties consent, unless the legislature has given the board power to do so. The statutes, reasonably interpreted, give the board jurisdiction.

ROBERT B. KUTZ

A-21-72

The appeal filed in the above-entitled case is hereby dismissed on the basis that jurisdiction is lacking. This dismissal shall become effective upon filing of this Final Order.

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NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

MILLER IMPORTS, INC., A California Corporation, Appellant,	)	Case No. A-22-72
v.	)	Filed: May 4, 1972
DEPARTMENT OF MOTOR VEHICLES, Respondent.	)	

Time and Place of Hearing:	April 12, 1972, 1:30 p.m. Director's Conference Room Department of Motor Vehicles 2415 First Avenue Sacramento, California
For Appellant:	Richard H. Cooper Attorney at Law Freshman, Marantz, Comsky & Deutsch 9171 Wilshire Boulevard Beverly Hills, CA 90210
For Respondent:	Honorable Evelle J. Younger Attorney General By: Mark Levin Deputy Attorney General

FINAL ORDER

The Director of Motor Vehicles, pursuant to Chapter 5, Part 1, Division 3, Title 2, of the Government Code issued a decision effective January 31, 1972, wherein it was found that appellant: (1) failed in two instances to timely submit to respondent a written notice of transfer of interest in a motor vehicle;

(2) wrongfully and unlawfully failed in one instance to mail or deliver to respondent the report of sale of a used vehicle together with such other documents and fees required to transfer the registration of the vehicle within the 20-day period allowed by law; (3) filed with respondent in one instance a false certificate of non-operation of a certain motor vehicle; and (4) in five instances included as an added cost to the selling price of certain motor vehicles registration fees in excess of the fees due and paid to the State by appellant.

It was further found that the untimely filing of sale and titling documents arose from the failure of an employee of appellant's to report the sale of a certain motor vehicle to appellant's business office. As a result thereof, the documents were not prepared and submitted to respondent. Further, when the same vehicle was sold to another customer, appellant's business office failed to search all of appellant's records and mistakenly executed a certificate of non-operation of the vehicle.

With reference to adding to the selling price of motor vehicles unauthorized registration and vehicle license fees, the director in one case (Item 3) [1/] found that appellant had included a $5.00 added cost by inadvertent error but also found that appellant had reimbursed this amount to the buyer before any

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1/ Item numbers referred to herein refer in every instance to the numbered items in Exhibit A attached to the Accusation.

representative of respondent's had contacted appellant following the sale. Also, appellant included an added cost of $3.00 to the selling price of one vehicle (Item 1) by inadvertent error.[2/]

Concerning the remaining findings involving the added cost for registration and vehicle license fees, respondent found that, at all times relevant, Miller Leasing, Inc., hereinafter referred to as "Leasing", was a California corporation engaged in the business of leasing automobiles at the same address as appellant. Leasing and appellant had the same shareholders and officers and both operations were small, closely-held family corporations. In 1970 appellant sold approximately 1,500 used cars and approximately 1,000 new cars.

All vehicles involved in the "added cost" findings, with the exception of the vehicle designated Item 1, were registered to Leasing and used by Leasing in the regular course of its business and, upon termination of the leases, were sold by Leasing to appellant who then sold them to retail buyers. Prior to selling these vehicles to appellant, Leasing, in the regular course of its business, paid to the Department of Motor Vehicles the 1970 registration and licensing fees for three of the vehicles and the 1971 registration fee for one of the vehicles. The fees were due to the department from Leasing. Appellant, upon purchasing these vehicles from Leasing, reimbursed Leasing for the

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2/ Although respondent made no finding concerning reimbursement to the customer for this unauthorized added cost, respondent stipulated at the administrative hearing that the $3.00 had been refunded. (R.T. 32:17.)

registration and vehicle license fees which Leasing had paid to the Department of Motor Vehicles. The amount added by appellant to the cost of the selling price charged to the retail buyers upon resale by appellant represented the amount paid by appellant to Leasing for reimbursement of the registration and vehicle license fees. Appellant has refused to repay to its customers the amounts it included in the selling price for these vehicles (except for the refunds it made of amounts charged in error, mentioned above, with respect to the vehicles designated Items 1 and 3). Appellant insists that it was entitled to include these amounts as an added cost to the selling prices and that to do so did not violate Section 11713(g) Vehicle Code. (All references are to the Vehicle Code unless otherwise indicated.

The Director of Motor Vehicles ordered the suspension of appellant's license, certificate and special plates for a period of five days for failure to give written notice to the department of the transfer of an interest in a motor vehicle; for a period of five days for the unlawful use of a report of sale; for a period of ten days for filing a false certificate of non-operation; and for a period of 15 days for including as an added cost to the selling price of vehicles additional registration and vehicle license fees in excess of the fees due and paid to the State by appellant. The suspensions were ordered to run concurrently resulting in a total of 15 days, however, the 15-day

suspension was stayed and appellant placed on probation for a period of one year under the condition that it obey all laws and the regulations of the Department of Motor Vehicles.

An appeal was timely filed with this board pursuant to Article 2, Chapter 6, Division 2, of the Vehicle Code. On appeal, appellant urged that no disciplinary action should be imposed because, under the proper construction of the relevant statute (Section 11713(g)), appellant was not violating the law when it passed on to the buyer added costs resulting from appellant's having reimbursed Leasing for the cost of registration and vehicle license fees and because the remaining findings of respondent are not of sufficient magnitude to warrant disciplinary action. In the alternative, appellant contends that, should this board disagree with appellant's interpretation of Section 11713(g), the penalty imposed therefor should be reversed on the grounds that appellant was acting in good faith.

DOES SECTION 11713(g) PRECLUDE A VEHICLE DEALER FROM PASSING ON TO A PURCHASER REGISTRATION AND LICENSE FEES WHICH THE DEALER HAS PAID TO ONE OTHER THAN THE STATE?

The relevant facts are: (1) Leasing and appellant were corporations having identical ownership; (2) Leasing owned vehicles which it leased to customers; (3) Leasing paid to the State registration and license fees for such vehicles; (4) the vehicles were sold by Leasing to appellant subsequent to the

termination of the leases; (5) when so sold, appellant reimbursed Leasing for the registration and license fees that Leasing had paid the State; and (6) when appellant sold the vehicles to its retail buyers, appellant passed on to the buyers the amount that appellant had reimbursed Leasing for the fees.

Section 11713(g) provides that it is unlawful and a violation of the code for a vehicle dealer:

> "To include as an added cost to the selling price of a vehicle, an amount for licensing or transfer of title of the vehicle, which amount is not due to the state unless such amount has in fact been paid by the dealer prior to such sale."

Respondent contends that the provision requires interpretation due to the absence of clear legislative intent, and that the Legislature intended that a dealer be allowed to pass on to the buyer only those registration and license fees that the dealer has paid directly to the State prior to the sale. Respondent argues that the statute is to be read as follows:

> "To include as an added cost to the selling price of a vehicle, an amount for licensing or transfer of title of the vehicle, which amount is not due (...) unless such amount has in fact been paid [to the state] by the dealer prior to such sale."

Appellant contends that Section 11713(g) does not preclude appellant from including as an added cost to buyers registration and license fees which it paid to Leasing because there is no language contained therein which requires a dealer to have paid such fees directly to the State before the dealer can lawfully pass the costs thereof to purchasers. Appellant further urges

that the statute is clear on its face and, therefore, resort to statutory construction is not authorized.

We find no ambiguity in the statute under discussion. It clearly makes unlawful the passing on to buyers costs of registration and vehicle license fees that are not due the State but it also provides for an exception; i. e., the dealer may pass on such costs when he has paid the fees prior to the sale. The exception is equally clear and there is no room for transposing a phrase as respondent seeks to do.

The rules of construction of statutes are applicable only where statutory language is uncertain and ambiguous. In Copeland v. Raub, 36 Cal.App.2d 441, the court set forth the rule of construction applicable to the case before us and discussed the evils resulting from ignoring the rule.

> "A multitude of authorities supports the emphatic declaration that the rules of construction of statutes, among which is a consideration of the benefits or evils which would result from the enforcement of the law, are applicable only when the statute is ambiguous and uncertain in its meaning. Sec. 1858, Code Civ.Proc.; In re Mitchell, 120 Cal.384, 52 P.799; 25 R.C.L. 957 §213.
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> "In the authority last cited it is said in that regard: 'A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself. When the meaning of a law is evident, to go elsewhere in search of conjecture in order to restrict or extend the act would be an attempt to elude it, a method which, if once admitted, would be exceedingly dangerous,

for there would be no law, however definite and precise in its language, which might not by interpretation be rendered useless. In such a case, arguments from the reason, spirit, or purpose of the legislation, from the mischief it was intended to remedy, from history or analogy for the purpose of searching out and justifying the interpolation into the statute of new terms, and for the accomplishment of purposes which the law-making power did not express, are worse than futile. They serve only to raise doubt and uncertainty where none exist, to confuse and mislead the judgment, and to pervert the statute.'

"The intent of the Legislature must be ascertained from the language of the enactment and where, as here, the language is clear, there can be no room for interpretation." (Caminetti v. Pacific Mutual Life Insurance 22 Cal.2d 344.)

"In construing statutory provisions, a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed contention that does not appear from its language. The court is limited to the intention expressed." (Seaboard Acceptance Corporation v. Shay, 214 Cal. 361, People v. One 1940 V-8 Coupe, 36 Cal.2d 471.)

"Words may not be inserted in a statute under the guise of interpretation." (In re Miller, 31 Cal.2d 191; Kirkwood v. Bank of America, 43 Cal.2d 333.)

"A court is not justified in ignoring the plain language of a statute unless it clearly appears that the language used is contrary to what was, beyond question, the intent of the Legislature." (Twaits v. State Board of Equalization, 93 Cal.App.2d 796.)

We do not perceive that a literal construction of the statute results in an effect contrary to the intent of the Legislature and, in passing, we remark that the rules of statutory construction guiding the courts are equally binding upon respondent and this board. We view Section 11713(g) as a tool constructed by the Legislature to prohibit dealers from perpetrating a fraud upon

vehicle buyers through the artifice of collecting an amount for registration and licensing fees that the dealer did not pay. The fact that the dealer paid such fees is sufficient basis for passing the cost thereof on to the buyer; it matters not that they were paid by the dealer to one other than the State. If, as respondent suggests, evils may arise from this interpretation of the law, the remedy is with the Legislature. We perceive no evil in the case before us.

Although we agree with appellant's interpretation of the relevant law, we deem it appropriate to comment on another aspect of the matter. Respondent concedes that appellant was not acting in a nefarious manner when it passed on to its customers costs of registration and license fees which appellant had paid to Leasing. In oral argument at the administrative hearing, counsel for respondent stated that appellant's "...belief is sincere..." (R.T. 64:21.) This concession is supported by facts found in the administrative record. Respondent's investigator called at appellant's place of business during May 1970 (R.T. 15:8) and talked to Mr. Miller concerning the department's interpretation of Section 11713(g). The investigator advised Mr. Miller that his understanding of the law was contrary to that of appellant's and that the fees must be repaid to the purchasers. (R.T. 14:12-25.) On June 13, 1970, appellant's office manager directed a letter (Appellant's Exhibit A) to the

Director of Motor Vehicles. The letter presented appellant's point of view with reference to Section 11713(g) and concluded with a request for a hearing and a review of the terminology of the section. However, an answer was not forthcoming until the accusation was filed.

Because we find that respondent has misapplied the law to the facts before us, we do not discuss other points raised by appellant.

We hold that respondent proceeded in a manner contrary to law with reference to its finding that appellant violated Section 11713(g) as to the vehicles described as Items 2, 3, 4 and 9 of Exhibit A, attached to the Accusation, and, therefore, we reverse Findings VII, except as to Item 1 and the overcharge of $5.00 in Item 3, and we reverse Determination of Issues IV of the Director's Decision.

In reversing Determination of Issues IV, we are mindful that any penalty imposed for the $3.00 added cost with respect to Item 1 and the $5.00 added cost with respect to Item 3 is also stricken. The director found these amounts to have been included by "inadvertent error". It was also found that the $5.00 overcharge was refunded to the buyer before any departmental representative called upon appellant. Further, the record shows that appellant also refunded to the buyer the $3.00 overcharge. These facts coupled with the minor nature of the violations,

when considered with appellant's volume of business, lead us to conclude that no penalty is warranted with respect to Item 1 and the $5.00 overcharge with respect to Item 3.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES FOR THE REMAINING FINDINGS COMMENSURATE WITH THOSE FINDINGS?

We are called upon to determine whether the penalty imposed for two untimely notices of sale, one untimely report of sale and one false certificate of non-operation is appropriate. A stayed suspension of 10 days was imposed for these violations with a period of one-year's probation. The director found that they occurred through the negligence of appellant's employees.

In oral argument at the administrative hearing, counsel for respondent conceded that some action on respondent's part short of filing an accusation would have been sufficient for all the charges brought against appellant, except those concerning violations of Section 11713(g). Counsel stated, "I think you have seen enough of these to know were it not for Item 6[3/] [violations of Section 11713(g)], the director's warning letter, perhaps merely a discussion with the licensee would have taken care of the other charges." (R.T. 64:13-16.)

We are in complete agreement that a letter or other communication from respondent would have satisfactorily resolved the

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3/ Counsel was referring to Paragraph 6 of the Accusation. This is made clear by his discussion of "6" at R.T. 64:17-23.

charges of the untimely filing of documents with respondent and the filing with respondent of false information, all concerning the sale of one vehicle. The administrative record shows that appellant desired to be cooperative with the department to the extent of sending a letter to the department for clarification of a statute as previously discussed. Certainly the time, money and effort expended by appellant to defend himself against these charges has a remedial effect as great as a warning letter or discussion.

Pursuant to the authority vested in us by Sections 3054(f) and 3055 and for the reasons heretofore discussed, [we reverse in their entirety the penalties imposed under 1(a), (b), (c) and (d) of the Director's Decision.] deleted

This Final Order shall become effective when served upon the parties.

AUDREY B. JONES

WINFIELD J. TUTTLE

CONCURRING OPINION

We are in complete accord with the foregoing order but believe we should comment upon the department's treatment of appellant under the circumstances shown by the record.

We do not believe that the department acted with fairness and common sense in this case. When a licensee, in good faith,

formally requests a hearing before the department to resolve a question of statutory construction, or application, as appellant did here, the department should either grant the request, or respond to the request in some manner other than by bringing an accusation against the licensee.

Under circumstances such as those reflected by this record, it appears that it was reasonable for the licensee to seek a decision from authority within the department other than the special investigator who called at the dealer's place of business in the course of an investigation. Appellant fully and fairly stated the problem in the letter. The letter was sent shortly after the issue was raised by the special investigator. The conduct in question was not immoral, did not pose a threat to appellant's customers, and did not involve any burden for the department in its day-to-day operations, other than to hear appellant's contentions and resolve them. It should be noted here that if the department felt otherwise about the appellant's conduct, it should have acted with dispatch after receiving appellant's letter. Instead it waited for over a year to respond. The letter was dated June 13, 1970. The accusation was not filed until June 30, 1971.

We do not view an administrative proceeding, the purpose of which is to impose license discipline for unlawful conduct, as an appropriate forum for resolution of questions such as this.

In an appropriate case, e.g., where the statute in question is ambiguous or overly general, and where the question involves a practice followed by many licensees (as appellant's letter indicated was the case here), the department should exercise its power to adopt regulations to guide the licensees and the public. Of course, since we have concluded that Section 11713(g) is not ambiguous, the department could not properly have asserted its position by adopting a regulation. If proceedings to adopt a regulation had been instituted, however, perhaps the hearings thereon would have persuaded the department that its views were in error. On the other hand, if the department had adopted such a regulation in this case, appellant and other interested licensees could have challenged the validity thereof without being subjected to disciplinary action against their licenses to engage in business pursuant to Section 11440 Government Code.

ROBERT B. KUTZ

PASCAL B. DILDAY

ROBERT A. SMITH

A-22-72

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Pursuant to the authority vested in us by Sections 3054(f) and 3055 and for the reasons heretofore discussed, we reverse in their entirety the penalties imposed under 1(a), (b), (c) and (d) of the Director's Decision.

This Final Order shall become effective _____.

CONCURRING OPINION

I am in complete accord with the foregoing order but believe we should comment upon the department's treatment of appellant under the circumstances shown by the record.

I do not believe that the department acted with fairness and common sense in this case. When a licensee, in good faith,

Winfield J. Sevitt

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This Final Order shall become effective_____.

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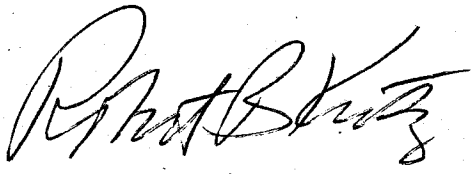

A-22-72

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A-22-72

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Pursuant to the authority vested in us by Sections 3054(f) and 3055 and for the reasons heretofore discussed, we reverse in their entirety the penalties imposed under 1(a), (b), (c) and (d) of the Director's Decision.

This Final Order shall become effective _____.

Audrey B. Jones

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I do not believe that the department acted with fairness and common sense in this case. When a licensee, in good faith,

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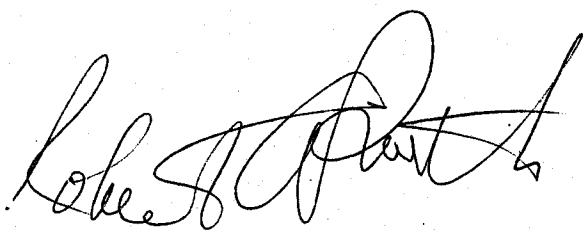

A-22-72

NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

MILLER IMPORTS, INC., A California Corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Respondent.	)	Case No. A-22-72 Filed: May 16, 1972

Time and Place of Hearing: April 12, 1972, 1:30 p.m.
Director's Conference Room
Department of Motor Vehicles
2415 First Avenue
Sacramento, California

For Appellant: Richard H. Cooper
Attorney at Law
Freshman, Marantz, Comsky & Deutsch
9171 Wilshire Boulevard
Beverly Hills, CA 90210

For Respondent: Honorable Evelle J. Younger
Attorney General
By: Mark Levin
Deputy Attorney General

CORRECTION OF FINAL ORDER

The Final Order of the New Car Dealers Policy and Appeals Board filed in the above-entitled case May 4, 1972, is hereby corrected.

The following language is deleted from page 12:

"...we reverse in their entirety the penalties imposed under 1(a), (b), (c) and (d) of the Director's Decision."

The following language is substituted therefor:

"...we reverse Determination of Issues IV, except Item 1 of Exhibit A attached to the Accusation and that part of Item 3 of said Exhibit A related to the $5 added cost included therein, Determination of Issues VI and we reverse the Order of the Director of Motor Vehicles in its entirety except Paragraph 3."

AUDREY B. JONES

WINFIELD J. TUTTLE

PASCAL B. DILDAY

ROBERT A. SMITH

ROBERT B. KUTZ

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

BERKEY LEE GARAGE, A California Corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Respondent.	)	Case No. A-23-72 Filed: July 6, 1972

Time and Place of Hearing:	June 14, 1972, 11:15 a.m. Director's Conference Room Department of Motor Vehicles 2415 First Avenue Sacramento, California
For Appellant:	T. Roy Hoover Attorney at Law 1305 Franklin Street Oakland, CA 94612
For Respondent:	Honorable Evelle J. Younger Attorney General By: Victor Sonenberg Deputy Attorney General

FINAL ORDER

An appeal was taken to this board from a decision of the Director of Motor Vehicles ordering disciplinary action against appellant's license, certificate and special plates. The basic facts are not disputed. Appellant was convicted in the Municipal

Court of the Berkeley-Albany Judicial District, County of Alameda, State of California, on a plea of nolo contendre, of the offense of violating Section 11713(n) Vehicle Code (disconnecting, turning back or resetting the odometer on a motor vehicle in violation of Sections 28050 or 28051[1/] Vehicle Code), a crime involving moral turpitude.

The underlying relevant and undisputed facts are that appellant, on October 23, 1969, took in on trade a 1966 Volkswagen which, at the time of the trade, had 88,000 miles registered on the odometer. Appellant spent approximately $350 at its internal shop rates repairing the vehicle. This work was done in appellant's shop over a period of months. During August 1970, the car was sold. The odometer then registered approximately 39,000 miles.

Appellant did not deny that the odometer registered about 49,000 miles less when the vehicle was sold than when it acquired it, but, notwithstanding the conviction on its nolo contendre plea, contends that the mileage was not reduced for any unlawful purpose. Johnny E. Lee, sole owner of appellant corporation, testified, "I don't know what happened. I believe the speedometer had been exchanged with another unit, somehow, is all I can come up with." (A.T. 21:13-15.) Testimony established that the

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1/ "Section 28051. It is unlawful for any person to disconnect, turn back or reset the odometer on any motor vehicle with the intent to reduce the number of miles indicated on the odometer gauge." Section 28050 has no bearing on the case before us.

car had been damaged extensively prior to its being traded to appellant, and the latter took the position that this damage could have necessitated the replacing of the speedometer unit. However, appellant's records did not show that it had replaced the speedometer unit or done any work on either the odometer or any component thereof, although detailed records were kept on appellant's repair work on the vehicle.

At oral argument before us, appellant moved for a continuance for the purpose of obtaining and presenting "newly discovered evidence" to augment the record. Appellant made an offer of proof that the person from whom it acquired the vehicle had tampered with the odometer prior to the trade-in. We denied the request for continuance and rejected the offer because what the former owner did or did not do prior to surrendering possession of the vehicle to appellant, could not have any significant bearing on the case. It was not disputed that after appellant acquired the automobile, the mileage indicated on the odometer was in fact reduced by about 49,000 miles or that appellant was convicted as a result thereof.

We were not favorably impressed with appellant's attempt to avoid the consequences of its plea of nolo contendre by contending that neither the judge, the district attorney nor appellant's counsel understood the significance of its plea. The pertinent Penal Code and Vehicle Code provisions are plain

and simple. For purposes of this proceedings, appellant pleaded guilty and was convicted of a crime involving moral turpitude.

The only question remaining is the appropriateness of the penalty.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH THE DIRECTOR'S FINDINGS?

The hearing officer recommended that the appellant's license, certificate and special plates be suspended for a period of 120 days, with the entire suspension stayed for a period of three years. During the three years, appellant was to be on probation and subject to the condition that it obey all laws and all rules and regulations of the Department of Motor Vehicles. This recommendation was not adopted by the Director of Motor Vehicles. The director ordered that only 105 days of the suspension be stayed, and that appellant cease the business of buying and selling vehicles for fifteen days. On appeal, appellant argued that a 15-day suspension was excessive, that this board should rescind the director's order and impose the penalty recommended by the hearing officer.

At the outset, we take note of the well-established principle that an administrative proceedings such as that giving rise to this appeal has as its primary purpose not

the punishment of the wrongdoer but the protection of the public. (Ready v. Grady 243 Cal.App.2d 113; Borror v. Department of Investments, 15 Cal.App.3d 539.) In a case involving a licensed building contractor, an appellate court had occasion to say that the purpose of the licensing law is primarily to "...keep the contracting business clean and wholesome, to the end that it may merit the respect and confidence of the public in general and in particular those who have recourse to contractors in the construction or improvement of their properties." The court recognized that the public can be protected and the status of the industry enhanced by an administrative sanction short of license revocation.

It further said, "...it [disciplinary proceeding] is not intended for the punishment of the individual contractor but for the protection of the contracting business as well as the public by removing, in proper cases, either permanently or temporarily, from the conduct of a contractor's business a licensee whose method of doing business indicates a lack of integrity upon his part or a tendency to impose upon those who deal with him." (West Coast Home Improvement Company v. Contractors State License Board, 72 Cal.App.2d 287.)

To impose no actual suspension on an automobile dealer who has unlawfully tampered with an odometer would, in our opinion, undermine public confidence in an industry that has made

commendable strides toward achieving the dignity it deserves. Further, no actual suspension, in a case of this kind, would suggest to the wrongdoer, as well as other licensees who may have an inclination towards facilitating the sale of automobiles through wrongful means, that the risks involved do not outweigh the benefits. It follows that we believe the 120-day stayed suspension recommended by the hearing officer is not appropriate.

On the other hand, we do not believe the facts of this case are such that an actual suspension of fifteen days is warranted. The director found that appellant had been an authorized Volkswagen dealer since the mid-1950's. There is nothing in the record to indicate appellant has ever violated a law or regulation governing its licensed business save only the single conviction charged in the accusation. Appellant employs 56 persons. Perhaps only one of them was guilty of the odometer tampering charged. There was no evidence whatsoever tending to show how the offense was committed or who among the corporate officers and employees was the culprit. It is reasonable to expect that a 15-day involuntary vacation would create economic harships to a substantial number of the innocent bystanders. Furthermore, the evidence failed to show that Mr. Lee, owner of appellant corporation and the person who most bears the burden of a cessation of business activity, was a participant in the odometer tampering or knew of it or

condoned the illegal conduct.

Balancing the gravity of this one wrongful act against the consequences flowing from an actual suspension, we are of the opinion that a five-day period of cessation of licensed business activities will best serve the public interest.

WHEREFORE THE FOLLOWING ORDER IS HEREBY MADE:

1. The dealer's license, certificate and special plates (D-1270) heretofore issued to appellant, Berkey Lee Garage, are hereby suspended for a period of one-hundred-twenty days (120); provided, however, one-hundred-fifteen (115) days of said suspension shall be stayed and appellant placed on probation for a period of three (3) years from the effective date of this decision on the following terms and conditions:

(a) Appellant shall obey all of the laws of the United States, of the State of California and its political subdivisions, and all rules and regulations of the Department of Motor Vehicles pertaining to the exercise of its privileges as a licensee. If appellant, or one of its officers, are convicted of a crime, including a conviction after a plea of not guilty or nolo contendre, such conviction shall be construed as a violation of the terms and conditions of any probationary license issued to appellant.

(b) The license, certificate and special plates (D-1270) heretofore issued to appellant are hereby suspended for a period of five (5) days.

2. Should the Director of Motor Vehicles at any time during the existence of said probationary period determine upon reliable evidence that appellant has violated any of the terms and conditions of probation, he may, in his discretion and after notice and opportunity to be heard, revoke said probation for the remainder of said suspension of the license, certificate and special plates as hereinabove set forth imposed; otherwise, upon full compliance by appellant of all of the terms and conditions of probation set forth and upon expiration of the term of probation, said stay of order of suspension shall become permanent.

This Final Order shall become effective July 24, 1972.

# # #

AUDREY B. JONES

ROBERT B. KUTZ

GILBERT D. ASHCOM

PASCAL B. DILDAY

JOHN ONESIAN

ROBERT A. SMITH

WINFIELD J. TUTTLE

A-23-72

D I S S E N T

I disagree with that portion of the decision of the majority that a five-day cessation of licensed business activities is appropriate in this case. In my opinion, adopting the recommendation of the hearing officer would be the proper decision of this board.

As far as can be determined from the record, appellant is a dealership that has served its community well for going on twenty years and without any prior disciplinary action. To close it down for five days for one isolated instance of odometer tampering under the circumstances of this case is uncalled for.

I am unable to comprehend just how the public interest is served any better by a five-day shutdown than it would be served by a stayed suspension of 120 days with a three-year period of probation. As the majority points out, economic hardship to many people results when a dealership is compelled to suspend business operations. Causing economic hardship is not compatible with public interest. Certainly the penalty recommended by the hearing officer would cogently serve notice on appellant and other dealers that odometer tampering is not something that will be winked at by enforcement authorities and would do so without causing chaos to innocent people.

Mr. Lee, owner of the dealership, made no attempt to conceal the fact that the odometer mileage had been reduced while the vehicle was at his dealership and his testimony that he didn't know how it happened was in no way questioned. He stands to sustain the brunt of the five-day shutdown ordered by the majority, which includes placing the franchise in jeopardy, even though the most the evidence shows concerning his culpability is that there may have been some negligent supervision on his part. If one instance of negligent supervision is to terminate an operation, all enterprises, including governmental agencies, will be closing their doors.

I would adopt the penalty recommended by the hearing officer.

W. H. "HAL" McBRIDE

(b) The license, certificate and special plates (D-1270) heretofore issued to appellant are hereby suspended for a period of five (5) days.

2. Should the Director of Motor Vehicles at any time during the existence of said probationary period determine upon reliable evidence that appellant has violated any of the terms and conditions of probation, he may, in his discretion and after notice and opportunity to be heard, revoke said probation for the remainder of said suspension of the license, certificate and special plates as hereinabove set forth imposed; otherwise, upon full compliance by appellant of all of the terms and conditions of probation set forth and upon expiration of the term of probation, said stay of order of suspension shall become permanent.

This Final Order shall become effective _____.

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Gilbert D. Ashcom

GILBERT D. ASHCOM

ROBERT B. KUTZ

PASCAL B. DILDAY

JOHN ONESIAN

ROBERT A. SMITH

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A-23-72

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WINFIELD J. TUTTLE

A-23-72

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A-23-72

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A-23-72

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A-23-72

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I would adopt the penalty recommended by the hearing officer.

W. H. "HAL" McBRIDE

NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

TRADEWAY CHEVROLET CO., INC. A California Corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Respondent	)	Case No. A-24-72 Filed: June 13, 1972

Time and Place of Hearing:	May 10, 1972, 11:15 a.m. Director's Conference Room Department of Motor Vehicles 2415 First Avenue Sacramento, California
For Appellant:	Don I. Asher Attorney at Law McFall, Burnett & Martin 146 North Grant Street Manteca, CA 95336
For Respondent:	Honorable Evelle J. Younger Attorney General BY: Joel S. Primes Deputy Attorney General

FINAL ORDER

This is an appeal from a decision of the Director finding that Tradeway Chevrolet Co., Inc., hereinafter referred to as "appellant", had: (1) in 14 instances, "...included as an added cost to the selling price of..." 14 specified vehicles "...additional registration fees in excess of the fees due and paid to the State"; and (2) disconnected, turned back or reset the odometer on a

certain motor vehicle, or caused the same to be done, in order to reduce the mileage indicated on the odometer gauge.

It was further found that the overcharges for registration fees due the State were part of normal but sometimes inaccurate transactions and that the inaccuracies resulted in both overcharging and undercharging for such fees. After the Department reviewed appellant's operations, appellant made its own audit and found 84 instances of "overcharges" and 248 "undercharges" in some 2000 sales during a period of two years. Appellant lost $2,639.00 in consequence of these errors. Appellant has repaid all but one of the customers overcharged as alleged in the accusation; i.e., in thirteen of the fourteen cases charged by the Department. However, in practice, prior to the audit, appellant had not reimbursed customers for overcharges unless requested by the customers.

Regarding odometer tampering, the director specifically found: The vehicle was driven from Oakland to Manteca on March 1, 1971, and that during that voyage the odometer was not disconnected. The distance between Oakland and Manteca is about 50 or more miles. The vehicle was thereafter driven on the same day, March 1, 1971, by one of appellant's salesmen for road demonstration for a potential customer. The customer called to the salesman's attention that the odometer was not connected. The vehicle was observed on appellant's lot on April 7, 1971, at which time the odometer registered 12 miles.

On April 7 or April 8, 1971, the salesman who gave the demonstration ride of March 1, 1971, commented to investigators for the Department of Motor Vehicles that he had, or would, connect the odometer because of their presence on the lot. The director further found that disclosure was not made to the ultimate purchaser of this vehicle that the odometer had been disconnected.

With respect to the finding that appellant charged customers an amount for registration and license fees in excess of those due the State, the Director of Motor Vehicles ordered that appellant's license, certificate and special plates be suspended for a period of 10 days. The entire suspension was stayed and appellant was placed on probation for a period of one year, subject to the condition that it make restitution of excess registration fees charged customers, including those revealed by appellant's own audit, and report to the Department of Motor Vehicles within 90 days of the effective date of the order its repayment of such fees, insofar as they can be accomplished, and obey all laws of the State of California and the regulations of the Department of Motor Vehicles governing its licensed business.

With respect to the finding involving odometer tampering, the Director of Motor Vehicles ordered that appellant's license, certificate and special plates be suspended for a period of twenty days, with fifteen days of the suspension

stayed, and appellant was placed on probation for a period of one year subject to the conditions previously mentioned.

On this appeal, appellant contends that the evidence does not support the findings.

DID APPELLANT INCLUDE AS ADDED COSTS TO THE SELLING PRICE OF VEHICLES AMOUNTS FOR REGISTRATION FEES WHICH AMOUNTS WERE NOT DUE THE STATE?

This question gives rise to two ancillary questions: (1) Did appellant use a "package method" when representing the total cost of a vehicle to a retail buyer in the 14 transactions charged in the accusation and, (2) if so, does the use of the "package method" violate Section 11713(g) 1/ Vehicle Code? (All statutory references are to the Vehicle Code unless otherwise indicated.) For reasons hereinafter discussed, we answer the first question in the affirmative and the second one in the negative. In doing so, and in respect to the discussion which follows, we wish to emphasize the fact that appellant's "package method" appears to have been utilized only with respect to sales which did not involve conditional sale contracts or the provisions of the Automobile Sales Finance Act. (Section 2981 et. seq. Civil Code). The "package method" could not be used lawfully in transactions subject to that Act which specifically requires a separate statement of the amount

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1/ This section provides that it is unlawful and a violation of the Vehicle Code for a vehicle dealer, "To include as an added cost to the selling price of a vehicle, an amount for licensing or transfer of title of the vehicle, which amount is not due to the state unless such amount has in fact been paid by the dealer prior to such sale." In the decision these fees are designated "registration fees" and we will hereinafter refer to them as "fees".

of transfer, registration and license fees in the conditional sale contract. (Section 2982 Civil Code). With respect to the charges involved in the accusation, there is no evidence whatsoever that the transactions involved conditional sale contracts or that the Automobile Sales Finance Act was applicable thereto, and respondent has made no reference to the Act in the administrative record. In this connection, we find it most perplexing that the department apparently selected 14 sales as the basis of its accusation wherein conditional sale contracts were not involved. Appellant's "package method" defense would have been inapplicable, and proof of "added cost" would have been sustained, had the department introduced into evidence conditional sale contracts drafted in compliance with Section 2982 Civil Code revealing that the customer had, in fact, been charged for registration fees amounts in excess of those due the State. There was no such proof.

The "package method" was described by Berthel Leroy Thompson, an employee of appellant, in the following colloquy between Mr. Thompson and counsel for appellant:

> "A Usually, the customer is quoted a price with sales tax and license included in it. And this price is written on a work sheet and is given to the customer, and the customer has a chance to go home to mull the idea over and decide whether or not this is a competitive enough price to purchase an automobile.
>
> "Q In other words, you give him all the price, to include all the costs, the tax, license, and registration fees, is that correct?

"A Right.

"Q And assuming the customer comes back and decides to buy the vehicle, what next transpires?

"A Then we, from this price, break out the sales tax, using a 5% chart. And then from taking the sales tax out, we try to determine how much the original license was for this vehicle." (Emphasis added) (A.T. 45:15-27.)2/

Because appellant gave the customer only a single dollar amount which covered the total cost to the customer for the vehicle, i.e., an amount to cover the car, all accessories, optional equipment, taxes and fees, before the fees were calculated, it is difficult to see how appellant could be said to have included any specific amounts for fees, much less an amount in excess of the fees due the State. Thus, in these 14 instances, appellant could not and did not "overcharge" for fees. Any amount appellant later computed and remitted to the State for fees which proved to be greater than the amount actually due to the State would be an over-payment of fees by appellant, not an overcharge of the customer. Neither Lou Blumberg nor Tim Blumberg referred to such amounts as "overcharges" when interviewed by departmental investigators. (A.T. 16:18.) Louis Blumberg did not regard the amounts in question as overcharges but considered them to be errors in bookkeeping. (A.T. 71:22-24.)

2/ "A.T." refers to the transcript of the proceedings before the Office of Administrative Hearings. The numbers following refer to the corresponding page and line number in the transcript.

The department produced no evidence to rebut appellant's contention that appellant used the "package method" when selling the automobiles involved in the transactions charged in the accusation.

It seems fundamental that one of the elements that must be proven before a licensed vehicle dealer can be found to have violated Section 11713(g) is that the dealer included as an "added cost" to the selling price of a vehicle an amount for fees. Nowhere in the administrative record can we find that this "added cost" element has been proven with respect to the transactions charged in the accusation.

Because we find that the "package method" as used by appellant in the sales involved in the accusation did not violate Section 11713(g), we reverse Finding of Fact III and Determination of Issues II of the Decision of the Director of Motor Vehicles.

IS THE FINDING THAT APPELLANT DISCONNECTED, TURNED BACK OR RESET THE ODOMETER, OR CAUSED THE SAME TO BE DONE, WITH THE INTENT TO REDUCE THE MILEAGE INDICATED ON THE ODOMETER GAUGE OF THE VEHICLE DESCRIBED IN FINDING IV SUPPORTED BY THE EVIDENCE?

The uncontroverted evidence relating to this question is as follows: Dahl Chevrolet, a dealer in Oakland, agreed to trade a new car for one of appellant's new cars. One of Dahl's employees drove the vehicle under its own power from Oakland to Manteca and delivered it to appellant's place of business. The distance between Oakland and Manteca is 50 or more miles. On the same day it arrived from Oakland and was

placed in appellant's inventory, the vehicle was demonstrated by one of appellant's salesmen to a prospective purchaser. The odometer was not operating during that demonstration ride. The odometer registered 12 miles when observed by a departmental investigator one week after the demonstration ride.

From these facts, it appears that the odometer mechanism was either inoperative before the vehicle was delivered to appellant in Manteca, or the mileage on the odometer gauge was reduced and the odometer rendered inoperative after the vehicle was delivered to appellant and before it was demonstrated for the customer on the day of its arrival from Oakland. If the former was the case, the odometer's inoperative condition could have been caused by mechanical malfunction or other cause, e.g., having been disconnected or rendered inoperative before it was delivered to appellant. If the latter was the case, a reasonable inference is that the appellant was responsible and violated the law.

The Director of Motor Vehicles specifically found that the vehicle was driven from Oakland to Manteca on March 1, 1971, and that, "The odometer was not then disconnected." Setting aside the fact that this finding does not rule out the possibility that the odometer may have been inoperative because of a mechanical malfunction during the trip from Oakland to Manteca, we are unable to find in the administrative record any substantial evidence to support the finding. The department's

burden of proof requires clear and convincing evidence.

> "The findings, decisions and orders of administrative agencies must be supported by evidence of their action. While disciplinary proceedings involving a revocation or suspension of licenses are not criminal in nature, all intendments are in favor of the accused and the charges against him must be proved by clear and convincing evidence before the right to engage in the licensed profession or business may be taken away. An administrative determination must be supported by something more than suspicion or conjecture speculative, theoretical conclusions, surmise, fanciful and fictitious pretense, inherent improbability, or uncorroborated hearsay or rumor. However, findings may be based on circumstantial evidence; and plausible theoretical conclusions, reasonably and fairly drawn from competent testimony, may be given weight. Otherwise such conclusions have no probative merit." (Emphasis added.) (2 Cal.Jur.2d, Administrative Law and Procedure, Sec. 145.)

The department failed to meet the "clear and convincing evidence" test. From the record before us it cannot be concluded that it is more likely than not that the odometer was functioning when the vehicle departed from Oakland or, even if it was, that it did not cease to function during the trip from Oakland to Manteca, and, even if it ceased to function during the trip, that this did not occur from mechanical breakdown rather than tampering. The evidence only establishes, without conflict, that the odometer was not operating on the day it was delivered to appellant, after the delivery and, although it had traveled 50 miles or more, that the odometer reading, several days later, indicated only 12 miles. This is a failure of proof.

Perhaps some illumination could have been brought to this jungle of darkness if the department had produced John Fields, the employee of Dahl Chevrolet who drove the vehicle from

Oakland to Manteca. However, the department elected to merely subpoena the relevant records of Dahl Chevrolet. These records were brought to the hearing by Bill Curley, appellant's sales manager. Under questioning by the hearing officer, Mr. Curley testified that he did not disconnect the odometer and he replied in the negative when asked by the hearing officer. "Did anyone at Dahl?" (A.T. 27:3-9.) However, under cross-examination, the following colloquy took place between Mr. Curley and counsel for appellant:

"Q Now, you stated that no one from Dahl Chevrolet disconnected the speedometer?

"A Yes. I mean, as far as the 'get ready.' This is the wrong odometer here, and anything that is done to the car is put on here. Our dealer is a very conservative person as far as speedometers and he says there's none as far as this dealer trade. If we want them and need the car, we just take them. When that car left Dahl, I can't speak for him, but our 'get ready' man would not have disconnected it for anyone because he's instructed not to.

"Q Did you ever see this particular car?

"A I don't recall.

"Q And you don't recall whether or not you didn't disconnect it in any way?

"A No sir.

"Q You didn't order it disconnected?

"A No sir.

"Q Other than that you don't know whether it was or not?

"A Yes sir.

"Q You say when it leaves Dahl it's no longer your responsibility?

"A I didn't say that. When it leaves Dahl, I don't know what happens to it; after that it's out of my control." (A.T. 28:2-25.)

This testimony effectively destroyed the witness's previous testimony that no one at Dahl Chevrolet disconnected the odometer. Mr. Curley said he did not personally order the odometer disconnected and he did not see anyone perform the act of disconnecting. But, other than that, he did not know whether or not it had been disconnected. As far as the "get ready" was concerned, Mr. Curley was of the opinion that the employee performing this function would not have disconnected the odometer because he is instructed not to do so. This self-serving opinion that a particular employee of Dahl Chevrolet would not tamper with an odometer has little, if any, evidentiary value. The "get ready" man may have failed to follow instructions, or the act may have been performed by one other than this employee. Mr. Curley merely believed that the "get ready" man would not tamper with an odometer but he had no actual knowledge of whether or not the odometer on the vehicle was actually disconnected.

Appellant's owner, Louis Blumberg, testified that he had not been involved in odometer tampering whatsoever during his 35 years as an automobile dealer. (A.T. 68:6-10.) Department investigators found no automobile on appellant's premises with disconnected odometers. (A.T. 21:8-20.) The policy of the dealership was not to have vehicles on the premises disconnected; when this occurs, it is merely an oversight. (A.T. 61:5-8.) While Noel McNeer, appellant's salesman, thought disconnecting

odometers on dealer trades was not unlawful, it wasn't appellant's policy. (A.T. 59:13-14.) Appellant could only have been guilty of tampering with or rolling back the odometer. In any event, if the indicated mileage was erroneous due only to the odometer having been disconnected, it could only have been disconnected prior to delivery at Manteca.

Appellant produced evidence that could only lead to the conclusion that the odometer was not rolled back or otherwise reset. Stanley Martens, a Chevrolet dealer, testified that the odometer on new General Motors Corporation vehicles is manufactured in such a way that undetected tampering is precluded. (A.T. 40:24 to A.T. 41:3.) Dick Wilmhurst, another Chevrolet dealer, testified that odometers on General Motors Corporation vehicles were manufactured in such a way that resetting would be reflected by lines on the odometer figures. (A.T. 42:24 to A.T. 64:22.) While the hearing officer ruled this testimony of these three witnesses was hearsay, it is competent, pursuant to Section 11513 Government Code, to supplement the testimony of Louis Blumberg. (Epstein v. California Horse Racing Board, 222 Cal.App.2d 831; Benedetti v. Department of Alcoholic Beverage Control, 187 Cal.App.2d 213.)

Respondent has shown marked ambivalence toward its theory of the case throughout this proceeding with respect to the odometer tampering charge. While the department charged in

the accusation filed against appellant that appellant "...disconnected, turned back or reset the odometer, or caused the same to be done...", the department appears to have proceeded at the administrative hearing solely on the theory that the odometer was disconnected, rather than reset or turned back. The department proceeded to prove that there were less miles on the odometer than there should have been considering the fact that the vehicle had been driven from Oakland to Manteca; that appellant's salesman, Noel McNeer, thought it was not unlawful for a new car dealer to disconnect the odometer on a new vehicle (A.T. 10:15-22.); that Louis Blumberg either knew or didn't know that the vehicle was delivered to appellant's place of business with the odometer disconnected (A.T. 11:19-22.); and that Louis Blumberg stated to a departmental investigator it was appellant's policy not to accept on dealer trade a vehicle with more than normal factory mileage showing on the odometer (Department's Exhibit 4). Further attempts by the department to support its "disconnect" theory are found in the direct examination of another department investigator, Stanley Harkness. This witness was asked to relate his conversation with Mr. Blumberg concerning the latter's knowledge of two Vegas, one being the automobile received from Dahl Chevrolet, being driven over the highways with disconnected odometers. (A.T. 36:20-21.)

However, the department proceeded to rebut its "disconnect"

theory through its witness, Bill Curley, the sales manager of Dahl Chevrolet. His testimony with respect to disconnecting odometers and whether he personally knew whether Dahl Chevrolet disconnected the odometer is discussed above.

On the other hand, nowhere in the administrative record do we find any indication that the department introduced or attempted to introduce any direct evidence that the odometer was reset or turned back. In fact, there was no discussion of a turn-back during the hearing until the hearing officer, commencing at A.T. 38:9, asked questions of a departmental investigator concerning the reducing of mileage on an odometer other than through disconnecting. Subsequent thereto, appellant produced witnesses to show that the odometer on the Vega had not been reset or turned back. The department's response to this evidence was merely to characterize it as hearsay. (A.T. 14:25-26; A.T. 43:28; and A.T. 64:21.) It is also significant that the department made no attempt to elicit any testimony from appellant's owner, general manager or other employees of appellant concerning resetting or turning back odometers.

The department filed a written opening argument after the case was submitted to the hearing officer. It argued, most inconsistently, that: (1) the evidence established that Dahl Chevrolet does not disconnect odometers and would not have

authorized the odometer on the Vega to be disconnected prior to delivery, and (2) the odometer may have been disconnected or reset with the identity of the persons committing the wrongful act being within the knowledge of appellant or its "...associates and or agents for that purpose...", i.e., that Dahl Chevrolet may have been an agent of appellant's in committing the wrongful act. Of course, no attempt was made to produce evidence of an agency relationship.

In discussing the Vega in its reply brief on appeal to this board, the department stated, "The odometer was disconnected when it was transported from Oakland and when appellant showed it to prospective customers." The department then went on to state, "Disconnecting of odometers on new car dealer trades conforms with appellant's stated policy to not accept new vehicles with high mileage..." (Respondent's Reply Brief 2:27 to 3:3) This argument, of course, is in direct contradiction of the finding of the Director of Motor Vehicles. In view of the finding of the director that the odometer was not disconnected when the vehicle was driven from Oakland to Manteca and the fact that the department did not attempt to prove anything other than a disconnect, an enormous hiatus appears.

It is apparent that the department has not proven any violation on appellant's part of Section 11713(n) by clear and convincing evidence as it is required to do. If we concurred

with the director's finding that the odometer was not disconnected at a time preceding or during the delivery of the Vega to appellant and also concurred with his finding that appellant violated Section 11713(n), we would then be called upon to infer that the odometer was turned back by appellant after taking delivery. We do not deem it appropriate to draw such an inference from the record before us in view of the evidence to the contrary which we have heretofore discussed and in view of the fact that there is no evidence in the record as to whether the odometer may have become inoperative from a mechanical malfunction during the trip to Manteca.

We have on several occasions in the past expressed our firm position that odometer tampering is a serious matter and the malefactor should be the recipient of severe sanctions. (Denis Dodge v. Department of Motor Vehicles, A-9-70; Zar Motors v. Department of Motor Vehicles, A-17-71; Chase-Nesse Auto, Inc. v. Department of Motor Vehicles, A-19-71; Rich Motor Co. v. Department of Motor Vehicles, A-16-71). We are, however, equally firm in our position that sanctions should be imposed only upon the proper party. The department has not established that this appellant was that party. The evidence on the ultimate issue simply was wanting. It follows that Finding of Fact IV and Determination of Issues III of the Decision of the Director of Motor Vehicles must be and are reversed.

Paragraph II of the Order of the Director of Motor Vehicles is reversed in its entirety.

This Final Order shall become effective when served upon the parties.

GILBERT D. ASHCOM	ROBERT B. KUTZ
PASCAL B. DILDAY	JOHN ONESIAN
MELECIO H. JACABAN	ROBERT A. SMITH

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NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

In the Matter of COBERLY FORD, a California Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Appeal No. A-25-72 Filed: November 14, 1972

Time and Place of Hearing:	October 18, 1972, 10:15 a.m. City Council Chambers City Hall 275 E. Olive Burbank, California
For Appellant:	George E. Leaver Attorney at Law Getz, Aikens & Manning 5900 Wilshire Blvd., Suite 770 Los Angeles, CA 90036
For Respondent:	Honorable Evelle J. Younger Attorney General By: Mark Levin Deputy Attorney General

FINAL ORDER

An appeal was taken to this board by Coberly Ford, hereinafter referred to as "appellant", from a decision of the Director

of Motor Vehicles imposing a 20-day suspension, with 10 days of said suspension stayed, of appellant's dealer license and special plates and placing appellant on probation for a period of one year under the condition that appellant obey all laws governing its licensed business and the regulations of the Department of Motor Vehicles. Proceeding via the Administrative Procedure Act (Sections 11500 et seq. Government Code), the director found that appellant had: (1) violated Section 2982(a) Civil Code in seven instances by obtaining the signature of buyers of automobiles on conditional sale contracts which did not include in a single document all the agreements of the parties; (2) overcharged customers in 14 instances for registration and vehicle license fees; (3) failed in 61 instances to give timely written notice to the department after transferring an interest in certain motor vehicles; (4) failed in 1,369 instances to submit timely to the department reports of sale of used vehicles together with other documents and fees required to transfer registration of the vehicles; and (5) failed in 2,258 instances to submit timely to the department the application for registration of certain new vehicles together with other documents and fees required to register the vehicles.

The director found in mitigation that: (1) appellant had received the Ford Motor Company Dealer Customer Relation Award in his district for the past five years; (2) the persons in

charge of the management of sales during the 1968 through 1969 period had been terminated and appellant had replaced these persons as well as hiring an outside service to handle reporting matters to the Department of Motor Vehicles; (3) the overcharges of registration and vehicle license fees were all refunded by appellant or an attempt to refund was made; and (4) extreme measures were taken from April 1970 through November 1970 by appellant to clear up the delays in reporting to the department by hiring extra employees and retaining an outside service to work additional hours.

No question of law or fact being presented to us by this appeal, we direct our attention at once to the appropriateness of the penalty. Appellant urges that an actual ten-day cessation of buying and selling vehicles with a one-year probationary period is excessive.

At the outset, we direct our attention to the harm that can be visited upon automobile purchasers and the general public when a dealer fails to meet his statutory responsibilities concerning reporting to the Department of Motor Vehicles transfers of interests in motor vehicles and the registration of vehicles which the dealer sells. As far back as 1924, the California Supreme Court, in the case of Parke v. Franciscus, 194 Cal. 284, said:

"The nature of motor vehicle traffic requires that there be a more certain indicia of ownership than mere possession, for the protection of the general public in case of accidents or violations of the law and to prevent frauds upon innocent purchasers. In order to effect this purpose, registration and identification of motor vehicles is required. . . . The identity and ownership of cars operated upon the public ways is of concern to the state."

More recently, the same court, in the case of Henry v. General Forming, Ltd., 33 Cal. 2d 233, said:

"The requirements for registration of title and ownership, as indicated by the code provisions,were enacted in the interests of the public welfare to protect innocent purchasers and afford identification of vehicles to persons responsible in cases of accident and injury."

"These registration provisions derive their importance from the nature of motor vehicle traffic which requires that there be readily ascertainable indicia of ownership for protection of the general public in the case of accident and violation of the law." (Larson v. Burnett, 101 Cal.App.2d 282.) (See also Bunch v. Kin, 2 Cal.App. 81; Rainey v. Ross, 106 Cal.App.2d 286; Canadian Indemnity Co. v. Motors Insurance Co., 224 Cal.App.2d 8; and Somerville v. Providence Washington Indemnity Co., 218 Cal.App.2d 237.)

In Rainey v. Ross, supra, the court said:

"The [legislative] plan was evolved into a well-ordered system of motor vehicle title registration, and the regulation of ownership rights and duties upon the basis of such registration."

Reviewing some of the significant provisions of this legislative plan, we find that it commenced in 1905 when the legislature provided for registration of motor vehicles (Stats. 1905, Ch. 612). To assure that motor vehicle dealers met their

responsibilities, the California Vehicle Act of 1915 provided that the certificate and special plates issued a dealer could be revoked in the event there was failure of compliance with the requirements of the law with reference to notices of sale and reports of transfer of motor vehicles (Stats. 1915, Ch. 188).

By 1919, the plan had been enlarged to effect rights and liabilities relating to vehicle ownership through registration requirements (Stats. 1917, Ch. 218). In 1929, the owner's imputed liability statute was enacted (Stats. 1929, Ch. 261), and during 1931, the legislature added a provision requiring the owner to give the state immediate notice of the sale of a vehicle, and to permit him to avoid future responsibility under the imputed liabilities statute by delivering the vehicle and the certificate of ownership, properly endorsed, to the buyer (Stats. 1931, Ch. 1026).

This board has consistently taken the view that meeting such responsibilities as hereunder discussed is indispensable to the orderly management of documents related to the ownership of motor vehicles and that such management is a matter of importance to the public welfare. In Bill Ellis v. the Department of Motor Vehicles, A-2-69, we said:

> "Timeliness and accuracy of reporting required data to respondent [Department of Motor Vehicles] is essential to the statutory duty of establishing and maintaining reliable records in determining fees due the state.

> In the absence of timely and accurate reporting, the difficulty of determining civil and criminal liability arising out of ownership and operation of approximately 12,500,000 motor vehicles registered in California is greatly increased; the state's ability to accurately assess and collect fees is impaired and the rights of purchasers and others entitled to certificates of ownership and certificates of registration are placed in jeopardy."

In Mission Pontiac v. Department of Motor Vehicles, A-6-70, we rejected appellant's argument that the only party that could be injured by the failure of a dealer to comply with statutory requirements regarding transfer of title of vehicles would be the dealer himself. We pointed out that the relevant statutes were "...enacted for several reasons unrelated to insulating an automobile dealer from liability to the public as owner of a vehicle following the transfer of his interest of a motor vehicle to another."

The potential for buyer frustration, inconvenience and legal entanglement, both criminal and civil, that may arise from delinquent reporting to the Department of Motor Vehicles on the part of dealers is too obvious to require elaboration. Having a highly mobile, expensive and readily marketable item of property with no indicia of ownership other than mere possession is simply incompatible with sound business practices. The legislature and the Department of Motor Vehicles, the administrative agency vested with the duty of registering vehicles (14,444,245 vehicles in 1971), have taken steps to provide for

a workable means of recording interests in vehicles and enforcing such requirements.

While we believe that the majority of new car dealers in California make substantial efforts and are reasonably successful in meeting their reporting requirements, too many, unfortunately, treat their responsibilities in this regard casually. We cannot emphasize too strongly that the filing with the department of the notice of transfer of interest in a vehicle pursuant to Section 5901 Vehicle Code and the application for transfer of ownership of a used vehicle or the application for registration of a new vehicle pursuant to Section 4456 Vehicle Code has consequences reaching far beyond merely informing the department who owns, and to what extent, an interest in a vehicle. As can be ascertained from the cases before our appellate courts, such filing actually determines the rights and liabilities of owners. It should be obvious to all concerned that reporting to the department required information is not a task that may be regarded as unimportant and delegated to an employee with a minimum of supervision. It is a task that is deserving of a close degree of supervision by top management or the dealer himself.

Lest there be any question about whether the legislature views timely reporting as important, we point out, as we did

in Fletcher Chevrolet, A-4-69, that failure of a dealer to adhere to the requirements of Section 5901 Vehicle Code (notice of sale) makes the dealer subject to prosecution for committing a misdemeanor (Section 40000.7 Vehicle Code). Failure to adhere to the requirements of Section 4456 (reports of sale) subjects a dealer to infraction sanctions (Section 40000.1 Vehicle Code). Such fines and imprisonment can be imposed in addition to disciplinary action against the dealer's license. When one considers the several hazards a dealer exposes his business to, to say nothing of the welfare of his customers, when he fails to meet departmental reporting requirements, one wonders how a dealer can regard such requirements other than as the most important aspect of his business operation.

Turning to the case before us, we are met with a number of factors which, in our opinion, are truly of a mitigating nature. Factors in mitigation generally do not, in our view, in any way serve to justify or excuse a wrongful act or lessen the seriousness thereof (Richards v. Gordon, 254 Cal.App.2d 735); certainly a buyer who has suffered inconvenience, anxiety or adverse fiscal consequences as a result of a dealer's delinquency, is in no way compensated therefor or even comforted by the fact that, for example, the dealer, as here, won an award from his franchisor.

This is not to say that mitigating factors are not relevant in determining the appropriate administrative sanction to be imposed upon erring licensees. It is a well-established principle that administrative proceedings have as a primary purpose, not the punishment of the wrongdoer, but, the protection of the public (Ready v. Grady, 243 Cal.App.2d 113; Borror v. Department of Investments, 15 Cal.App.3d 539; West Coast Home Improvement Company v. Contractors State License Board, 72 Cal.App.2d 287.) In the latter case, the court said, "... it [disciplinary proceeding] is not intended for the punishment of the individual contractor but for the protection of the contracting business as well as the public by removing, in proper cases, either permanently or temporarily, from the conduct of a contractor's business a licensee whose method of doing business indicates a lack of integrity upon his part or a tendency to impose upon those who do business with him." It follows that where, as here, the wrongful acts call for some administrative sanction short of license revocation, several factors require consideration when arriving at the appropriate discipline. These factors, in our opinion, include the extent that the discipline will serve notice to other licensees that violations of the laws governing the licensed business will not be condoned; the extent that the discipline will assure the public that the automobile retail business is deserving of

public confidence and the extent that the discipline will motivate the erring dealer to take steps to put his business in proper order and keep it in such order.

We note in the case before us that the review of appellant's dealership commenced during 1968 and the accusation filed February 28, 1970. The hearing consumed four days and spanned a period of nine months. The Director's Decision was not filed until February 16, 1972. Appellant timely filed its appeal with this board but, apparently, through no fault of its own, was unable to file the administrative record for nearly six months. We are aware that these unfortunate delays, whatever the reasons therefor, in bringing the case before us do not minimize the cumulative gravity of the offenses. But, we are of the firm opinion that one laboring for several years under the stress of potential license discipline should be sufficiently motivated to keep his business in order; an actual suspension, with its far-reaching economic consequences to innocent persons, is unnecessary under these circumstances. In fact, the record demonstrates that the filing of the accusation provided sufficient motivation for appellant to place his business in order and we do not believe that an actual suspension would add to such motivation.

The same factors motivating appellant to put and keep its business in a condition that meets statutory standards

should deter other dealers from falling into lackadaisical reporting practices. Certainly no man wants to operate his business under a Damocles sword. Further, we do not believe public confidence in the integrity of the automobile retail industry will in any way be diminished by an administrative order calling for less than an actual cessation of business activities. Public interest, which is of paramount importance in matters of this kind, will be adequately safeguarded by a suspended sentence coupled with a probationary period.

We have already alluded to another factor which militates towards no actual suspension in this case. This concerns appellant's reaction when made aware of its reporting deficiencies. In most cases coming before us on appeal, the accused dealer took some steps to correct those business malfunctions alleged in the accusation that the dealer did not deny. However, the record in this case amply demonstrates that the officers of appellant corporation, upon becoming aware of the trouble provoking areas, took sincere, immediate and effective steps to correct these practices which led to reporting deficiencies. Employees who could not do the job or had an inappropriate attitude toward abiding by statutory requirements were discharged. An outside firm specializing in Department of Motor Vehicles work was employed on a full-time basis and several employees

were assigned to appellant on a seven day per week basis. A business manager and an office manager of demonstrated competency were borrowed from another Ford agency. Appellant spent approximately $50,000, excluding attorney fees and "misuse" fees, correcting reporting deficiencies. It is abundantly clear to us that appellant has focused the requisite degree of attention upon the reporting to the department aspect of its business and we believe that a one-year probationary period affords the department adequate time to determine whether or not appellant's corrective measures have produced the desired results. If, for whatever reason, the proper results are not being achieved, the Director of Motor Vehicles has the power to, and should, take more stringent action.

In the exercise of the authority vested in us by Section 3054 (f) Vehicle Code, we amend the Decision of the Director of Motor Vehicles to provide as follows:

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The dealer's license, certificate and special plates heretofore issued to appellant Coberly Ford, a California corporation, are hereby suspended for a period of twenty (20) days; provided, however, the entire twenty (20) days of said suspension is hereby stayed and appellant is placed on probation for a period of one (1) year under the following terms and conditions:

1. Appellant shall strictly comply with all of the provisions of the Vehicle Code and the regulations of the Department of Motor Vehicles governing dealers in motor vehicles in the State of California.

2. Appellant shall obey all laws of the United States and of the State of California and the political subdivisions thereof, and the rules and regulations of the Department of Motor Vehicles.

If, and in the event, the Director of Motor Vehicles should determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the director may terminate the stay and impose the stayed suspension or otherwise modify the order.

In the event the appellant shall faithfully keep the terms of the conditions of probation imposed for the period of one (1) year, the stay shall become permanent and the appellant shall be restored to all of its license privileges.

This order shall become effective when served upon the parties.

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A-25-72

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A-25-72

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NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

In the Matter of TOWN & COUNTRY BUICK, a California Corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Appeal No. A-26-72 Filed: August 15, 1972

Time and Place of Hearing: July 19, 1972, 1:30 p.m.
City Council Chambers
City Hall
625 E. Santa Clara Street
Ventura, California

For Appellant: George E. Leaver
Getz, Aikens & Manning
5900 Wilshire Blvd., Suite 770
Los Angeles, CA 90036

For Respondent: Honorable Evelle J. Younger
Attorney General
By: Mark Levin
Deputy Attorney General

FINAL ORDER

The appropriateness of the penalty imposed by the Director of Motor Vehicles is the only issue this appeal presents for our consideration.

Proceeding via the Administrative Procedure Act (Section 11500 et seq. Government Code), the director found that Town & Country Buick, Inc., hereinafter referred to as "appellant", had: (1) included in the selling price of motor vehicles in four instances a cost for registration and license fees in excess of the fees due and paid to the State; (2) hired an unlicensed salesman for a period of approximately one week; and (3) disconnected odometers on five vehicles in order to reduce the mileage on the odometer gauges.

The director imposed a penalty of two five-day suspensions stayed for a period of one year for the violations involving over-charging of fees and hiring an unlicensed salesman. A period of 25 days' suspension was imposed for the violations involving the disconnecting of odometers, however, 15 of the 25 days were stayed for a period of one year. All suspensions were ordered to run concurrently. Thus, appellant is required to cease the business of buying and selling automobiles for a period of 10 days and, after the expiration thereof, appellant would be on probation for a period of one year on the condition that it strictly comply with all of the provisions of the Vehicle Code and all relevant regulations of the Department of Motor Vehicles.

We are requested by appellant to stay the entire suspension, thereby, allowing it to continue uninterrupted the business of buying and selling motor vehicles.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH THE DIRECTOR'S FINDINGS?

We need not detail our position with reference to odometer-tampering on the part of a seller of an automobile; suffice it to repeat a brief statement we have previously made. "...[T]he manipulation of an odometer for the purpose of reducing the mileage indicated thereon is one of the most serious wrongs that a licensee or non-licensee can commit in the sale of an automobile." (Zar Motors v. Department of Motor Vehicles, A-17-71; Chase Nesse Auto, Inc., v. Department of Motor Vehicles, A-18-71; Rich Motor Co. v. Department of Motor Vehicles, A-16-71.)

We reject appellant's argument that reduction of the penalty is in order because three of the five odometer violations involved disconnecting in connection with dealer-trades. While this practice was legal from November 1968 to November 1969, pursuant to Section 28051 Vehicle Code as it read during that period, the Legislature made it abundantly clear that such practice would no longer be lawful after November 1969. Appellant exposed its license to discipline when it elected to ignore the legislative mandate; to grant

it any relief on the grounds that the unlawful acts at one time were lawful would be incompatible with the public welfare.

The odometer on another vehicle was disconnected when a salesman took the vehicle to the drag race for display purposes. Apparently the disconnecting occurred without the knowledge or consent of any of appellant's officers. We draw an inference that the dealership was so infected with the practice of odometer disconnecting that a statement of appellant's sales manager, Roy Apple, to the salesman that the latter was not to put too many miles on the vehicle (A.T. 46:21)[1/] was reasonably interpreted by the salesman as authorization to disconnect the odometer.

With reference to the vehicle operated by appellant's business manager, hereinafter referred to as the "Farquer vehicle", appellant's president had the odometer disconnected when the business manager decided to buy the vehicle. This was, of course, a flagrant violation of the law and further evidence of appellant's disregard for the laws governing its privileges as a licensee and its disregard of business ethics.

1/ "A.T." refers to the transcript of the proceedings before an officer of the Office of Administrative Hearings. The numbers refer to the corresponding page and line numbers in the transcript.

Appellant contends its purpose in disconnecting odometers "...is to give the customer the maximum mileage on his warranty." (A.T. 19:10-15.) We are unimpressed with the "saving the warranty" argument for three reasons. One, the controlling statutes (Sections 11713(n) and 28051 Vehicle Code) do not authorize a dealer to display such altruism. Two, "saving the warranty" by this means can perpetrate a fraud upon the warrantor and does so upon subsequent buyers. Three, the argument is based upon a false premise; i. e., no warranty is saved because Section 28052 Vehicle Code, which became effective November 10, 1969, provides that the warranty does not commence to run, as far as mileage is concerned, until the vehicle is sold as new to the purchaser.

We are also unimpressed with appellant's disclosure to buyers the fact that the odometer reading did not reflect true mileage. Buyers of the vehicles were peculiarly at the mercy of appellant in this regard; they had no way of verifying the mileage driven with the odometer disconnected. It may have been the policy of the dealership to reconnect the odometers at the time the dealer-traded vehicles arrived at appellant's place of business, but this policy was not always

followed as evidenced by the fact that departmental investigators found vehicles at appellant's established place of business with disconnected odometers. Furthermore, subsequent purchasers are harmed because it is unlikely that the first purchaser will disclose to subsequent purchasers the correct mileage.

The record abundantly demonstrates that appellant abused its privilege of buying and selling automobiles and it fully supports the penalty as fixed by the Director of Motor Vehicles. We, therefore, affirm the decision of the Director of Motor Vehicles in its entirety.

This Final Order shall become effective August 30, 1972.

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NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

In the Matter of PARK MOTORS, INC., a California Corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Appeal No. A-27-72 Filed: October 13, 1972

Time and Place of Hearing:	September 13, 1972, 1:00 p.m. Director's Conference Room Department of Motor Vehicles 2415 First Avenue Sacramento, California
For Appellant:	Harold C. Wright Brown & Wright Stanford Financial Square 2600 El Camino Real, Suite 411 Palo Alto, CA 94306
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Alan Mateer Staff Counsel

FINAL ORDER

This is an appeal from a decision of the Director of Motor Vehicles wherein it was found that Park Motors, Inc., hereinafter

referred to as "appellant" had: (1) in three instances failed to file with the Department of Motor Vehicles, hereinafter referred to as "respondent", written notices of the transfer of interest in certain motor vehicles within the time allowed by law; (2) wrongfully and unlawfully failed in two instances to mail or deliver to respondent the report of sale of used vehicles together with such other documents and fees required to transfer the registration of the vehicles within the time allowed by law; (3) wrongfully and unlawfully failed in three instances to mail or deliver to respondent the application for registration of new motor vehicles together with other documents and fees required to register the vehicles within the time allowed by law; (4) reported to respondent in one instance a date other than the true date for the first date of operation of a certain motor vehicle, thereby making a false statement in the application for registration of the vehicle; (5) in 85 instances included as an added cost to the selling price of vehicles, registration fees in excess of the fees due and payable to the state; (6) unlawfully permitted customers in two instances to operate a motor vehicle on the highways while displaying dealers' special plates; (7) disconnected, turned back or reset the odometers in order to reduce the mileage thereon on two automobiles; (8) employed a person as a vehicle salesman when that person was not licensed as a

salesman; (9) failed in one instance to have posted in a conspicuous place on the premises the dealer's license; and (10) caused to be published in three instances advertising which was misleading and inaccurate in material particulars.

In mitigation of the wrongful conduct concerning the overcharges for vehicle license fees, the director found that appellant had made refunds except in those few instances when mail was returned although appellant was "quite slow" in making the refunds. The director expressly rejected the explanation of appellant's president that he was awaiting approval of the department before making restitution. The director also found that appellant frequently undercharged customers for vehicle license fees and that appellant had instituted controls designed to prevent a recurrence of overcharges.

The Order of the Director of Motor Vehicles provides for a stayed revocation while appellant serves a three-year probationary period. The conditions of probation require appellant to cease the business of buying and selling vehicles for a period of thirty days.

The appeal calls for this board to determine whether or not the findings are supported by the weight of the evidence in light of the whole record reviewed in its entirety; whether or not the department has proceeded in a manner contrary to law and whether or not the order imposed by the director is

commensurate with the findings.

THE FINDINGS

At the outset, we remark that Section 3054, subsection (e), requires us to use the independent judgment rule when reviewing the evidence. Pursuant to this rule, we are called upon to resolve conflicts in the evidence in our own minds, draw such inferences as we believe to be reasonable and make our own determination regarding the credibility of witnesses' testimony in the transcript of the administrative proceedings. (Holiday Ford v. Department of Motor Vehicles, A-1-69; Weber and Cooper v. Department of Motor Vehicles, A-20-71.)

Applying the weight of the evidence rule, we do not find sufficient support for the Director's Finding X (operation of the Van Duzer vehicle on special plates); Finding XIII (employing one as a vehicle salesman who was not so licensed); Finding XIV (failing to post in a conspicuous place the dealer's license); Finding XVI (advertising incorrect year model of a vehicle); or Finding XVII (advertising incorrect license number of a vehicle.)

With reference to the operation of the Van Duzer vehicle on special plates, respondent argues that 13 Ops.Cal.Atty. Gen. 161 sets forth the controlling law on the matter. We agree. That opinion concludes that the law authorizes a

dealer to permit a prospective customer to drive a vehicle for demonstration purposes without being accompanied by a representative of the dealer "...only so far as is necessary to make a proper demonstration of the vehicle." Under the facts surrounding the sale of the vehicle by appellant to Ruth Van Duzer, we do not believe there was any breach of the law as interpreted by the Attorney General with reference to the use of the dealer plates. The actual sale of the vehicle to Van Duzer did not occur until September 10, 1969, which was the same date that the dealer plates were removed from the vehicle.

The undisputed evidence shows that the vehicle had been in a major accident and had undergone extensive repairs prior to its being sold to Van Duzer. Appellant's president, Ray Bowen, went to substantial lengths to ascertain that Van Duzer would be satisfied with the vehicle and permitted her to operate it for demonstration purposes from August 17, 1969, to September 10, 1969. We do not believe it unreasonable for a dealer to permit a vehicle to be used by a customer for demonstration purposes for nearly four weeks under the facts in the Van Duzer transaction.

In our view, the evidence preponderates against the finding that appellant hired Jack Fiddler, an unlicensed person, as a vehicle salesman, notwithstanding the broad

definition of vehicle salesman under Vehicle Code Section 675. There is no doubt that Fiddler acted during the relevant time as appellant's business manager but this, in and of itself, did not place him in the position of exercising managerial control over appellant's business or in a position of supervising appellant's vehicle salesmen. The evidence preponderates to the view that Fiddler's primary responsibility was tending to appellant's fiscal affairs.

With regard to the director's finding that appellant failed, from November 29, 1969, to December 5, 1969, to have its dealer's license posted in a conspicuous place, the evidence established only that one of respondent's investigators observed, on each of the two dates mentioned, that the license was contained in a picture frame which was "...hanging down on the top of a cabinet in the firm's office..." Appellant produced evidence to show that it had reason to remove the picture frame from its usual place on the wall on both November 29 and December 5, 1969. A witness called by appellant recalled that the license was "reposed" between the dates observed by the investigator. Respondent produced no evidence to show that the license was not conspicuously posted between those dates. We find that the weight of the evidence establishes that the dealer's license was properly posted.

With reference to the finding that appellant advertised a 1967 Peugeot and a 1968 Plymouth in a newspaper in a misleading and inaccurate manner, in our view the inaccuracies resulted from mere unintentional errors on the part of either the appellant or the publisher of the newspaper containing the advertisements and do not provide a basis for license discipline.

Accordingly, Findings of Fact X, XIII, XIV, XVI and XVII and Determination of Issues 6, 10, 11 and that portion of 12 that relates to Findings of Fact XVI and XVII are reversed. The remaining Findings of Fact are affirmed.

THE LAW

Appellant argues that the hearing officer and the director misunderstood the law applicable to the facts surrounding the two instances of odometer tampering. Appellant contends that the odometers on the Thornton and Hager vehicles were defective, and the reduced mileage thereon resulted only from odometer replacement. If we believed these to be the facts, we would concur with appellant's statement that respondent misapplied the law as it existed at the relevant time. However, we concur with the director's rejection of appellant's contention that the odometers were replaced to correct a defective condition. Section 2805.1

subsection (d) Vehicle Code[1/] is inapplicable.

Finding no error elsewhere in respondent's interpretation or application of the law, we affirm Determination of Issues 1 through 5, 7 through 9, and 11 as it relates to Finding of Fact XV.

THE ORDER

We are of the opinion that the order made by the Director of Motor Vehicles for those Findings of Fact and Determination of Issues which we have affirmed is commensurate with such findings and determinations. To impose a lesser sanction would be incompatible with the interests of the public and the automobile retail industry.

Accordingly, the Order of the Director of Motor Vehicles is amended as follows:

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The dealer's license, certificate and special plates (D-4227) heretofore issued to appellant, Park Motors, Inc., are, and each is hereby, revoked; provided, however, that the effectiveness of said order of revocation shall be

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1/ Section 2805.1, at the time relevant to these proceedings, provided that it was not unlawful for any person to disconnect, turn back or reset an odometer with the intent to reduce the number of miles indicated thereon when, among other things, there was a "replacement of a damaged or broken speedometer with a new speedometer when the odometer on the new speedometer registers '0' miles."

stayed for a period of three (3) years from the effective date of this decision, during which time the appellant shall be placed on probation to the Director of Motor Vehicles of the State of California upon the following terms and conditions:

1. The dealer's license, certificate and special plates (D-4227) heretofore issued to appellant, Park Motors, Inc., are suspended for a period of ten (10) days on each cause of disciplinary action described in Determination of Issues paragraphs 1, 2, 3, 7, and that part of 12 which relates to Findings of Fact XVI and XVII, considered separately and independently, but the said suspensions shall run concurrently.

2. The dealer's license, certificate and special plates (D-4227) heretofore issued to appellant Park Motors, Inc., are suspended for a period of twenty (20) days on each cause for disciplinary action described in paragraphs 4 and 5, Determination of Issues above, considered separately and independently, and said suspensions shall run concurrently with each other but consecutively with the suspensions imposed by paragraph 1 of this ORDER for a total suspension of thirty (30) days.

3. The dealer's license, certificate and special

plates (D-4227) heretofore issued to appellant, Park Motors, Inc., are suspended for a period of thirty (30) days on each cause for disciplinary action described in paragraphs 8 and 9, Determination of Issues above, considered separately and independently, and said suspensions shall run concurrently with each other and with the suspensions imposed by paragraphs 1 and 2 of this ORDER for a total suspension of thirty (30) days.

4. Appellant shall obey all of the laws of the State of California and all rules and regulations of the Department of Motor Vehicles governing the exercise of its privileges as a licensee.

5. If appellant is convicted of a crime, including a conviction after a plea of not guilty or nolo contendere, such conviction shall be considered a violation of the terms and conditions of the probation imposed herein.

If and in the event that the Director of Motor Vehicles shall determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the Director may terminate the stay and impose the revocation or otherwise modify this order. In the event that appellant faithfully keeps the terms of the conditions imposed for the period of three (3) years, the stay shall become permanent and the respondent shall be fully restored to all of its license privileges.

This FINAL ORDER shall become effective November 1, 1972 .

AUDREY B. JONES

ROBERT B. KUTZ

GILBERT D. ASHCOM

MELECIO H. JACABAN

W. H. "HAL" McBRIDE

ROBERT A. SMITH

A-27-72

This FINAL ORDER shall become effective _____.

AUDREY B. JONES

Gilbert D. Ashcom

GILBERT D. ASHCOM

ROBERT B. KUTZ

MELECIO H. JACABAN

W. H. "HAL" McBRIDE

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A-27-72

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A-27-72

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GILBERT D. ASHCOM

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W. H. "HAL" McBRIDE

ROBERT A. SMITH

A-27-72

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY AND APPEALS BOARD

In the Matter of PARK MOTORS, INC., a California corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-27-72 Filed: November 19, 1973

Time and Place of Reconsideration:	November 14, 1973, 12:30 p.m. Board Room, Port of Long Beach Administration Building 925 Harbor Plaza Long Beach, CA
For Appellant:	Harold C. Wright Brown & Wright Stanford Financial Square 2600 El Camino Real, Suite 411 Palo Alto, CA 94306
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Alan Mateer Staff Counsel

FINAL ORDER AFTER RECONSIDERATION

Pursuant to the Judgment of the Superior Court of the State of California for the County of Sacramento, dated October 24, 1973, (No. 227660), and the Peremptory Writ of

of Mandamus and Findings of Fact and Conclusions of Law issued by said court and related thereto, all incorporated herein by reference, the Final Order of the New Car Dealers Policy and Appeals Board filed October 13, 1972, in the above-entitled case, is set aside and the following Findings of Fact, Determination of Issues and Order are hereby made.

FINDINGS OF FACT

The following Findings of Fact are deemed supported by the weight of the evidence and are affirmed: Findings of Fact IV, V, VII, VIII, IX, XI, XII and XIX.

The following Findings of Fact are deemed not supported by the weight of the evidence and are reversed: Findings of Fact X, XIII, XIV, XV, XVI and XVII.

Finding of Fact III is affirmed in part and reversed in part. So much of Finding of Fact III as relates to Items 6 and 7 in Exhibit B is affirmed. So much of Finding of Fact III as relates to Item 1 in Exhibit B is reversed.

Finding of Fact XVIII is affirmed except for the following language contained in paragraph 1 thereof which language is found untrue and is deleted:

> "In this connection, it is noted that respondent [appellant] was quite slow in making the refunds. The explanation offered by its President that he was awaiting approval of the Department before making restitution is not satisfactory."

The following language is affirmed and substituted therefor:

"In this connection, it is found that appellant's president was being super-cooperative with the department in awaiting approval from the department before making the restitution."

DETERMINATION OF ISSUES

Determination of Issues 1, 2, 3, 4, 5, 7, 8 and 9 are affirmed.

Determination of Issues 6, 10, 11 and 12 are reversed.

THE ORDER

WHEREFORE, THE FOLLOWING ORDER IS HEREBY MADE:

The dealer's license, certificate and special plates (D-4227) heretofore issued to appellant, Park Motors, Inc., are, and each is hereby, revoked; provided, however, that the effectiveness of said order of revocation shall be stayed for a period of three (3) years from the effective date of this decision, during which time the appellant shall be placed on probation to the Director of Motor Vehicles of the State of California upon the following terms and conditions:

1. The dealer's license, certificate and special plates (D-4227) heretofore issued to appellant, Park Motors, Inc., are suspended for a period of ten (10) days on each cause of disciplinary action described in paragraphs 1, 2, 3 and 7 of

Determination of Issues above, considered separately and independently, but the said suspensions shall run concurrently.

2. The dealer's license, certificate and special plates (D-4227) heretofore issued to appellant, Park Motors, Inc., are suspended for a period of thirty (30) days on each cause of disciplinary action described in paragraphs 8 and 9, Determination of Issues above, considered separately and independently, and said suspensions shall run concurrently with each other and with the suspensions imposed by paragraph 1 of this ORDER for a total suspension of thirty (30) days.

3. The dealer's license, certificate and special plates (D-4227) heretofore issued to appellant, Park Motors, Inc., are suspended for a period of one (1) day on each cause of disciplinary action described in paragraphs 4 and 5, Determination of Issues above, considered separately and independently, and said suspensions shall run concurrently with each other and with the suspensions imposed by paragraphs 1 and 2 of this ORDER for a total suspension of thirty (30) days.

4. Appellant shall obey all of the laws of the State of California and all rules and regulations of the Department of Motor Vehicles governing the exercise of its privileges as a licensee.

5. If appellant is convicted of a crime, including a conviction after a plea of not guilty or nolo contendere,

such conviction shall be considered a violation of the terms and conditions of the probation imposed herein.

If, and in the event that, the Director of Motor Vehicles shall determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the director may terminate the stay and impose the revocation or otherwise modify this order. In the event that appellant faithfully keeps the terms of the conditions imposed for the period of three (3) years, the stay shall become permanent and the respondent shall be fully restored to all of its license privileges.

This FINAL ORDER AFTER RECONSIDERATION shall become effective November 29, 1973.

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

AUDREY B. JONES

JOHN ONESIAN

ROBERT A. SMITH

WINFIELD J. TUTTLE

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This FINAL ORDER AFTER RECONSIDERATION shall become effective November 22, 1973.

GILBERT D. ASHCOM

PASCAL B. DILDAY

MELECIO H. JACABAN

AUDREY B. JONES

JOHN ONESIAN

ROBERT A. SMITH

WINFIELD J. TUTTLE

A-27-72

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This FINAL ORDER AFTER RECONSIDERATION shall become effective Gilbert D. Gibson.

A-27-72

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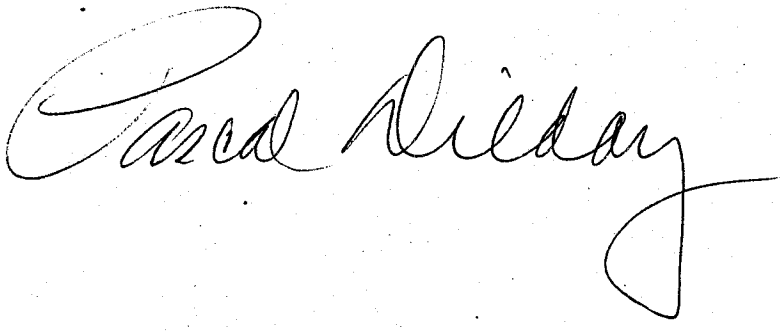

A-27-72

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This FINAL ORDER AFTER RECONSIDERATION shall become effective Melvin H. Jacobs

A-27-72

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This FINAL ORDER AFTER RECONSIDERATION shall become effective Audrey B. Jones

A-27-72

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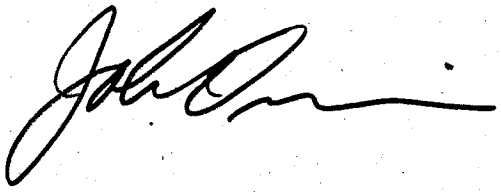
This FINAL ORDER AFTER RECONSIDERATION shall become effective_____.



A-27-72

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This FINAL ORDER AFTER RECONSIDERATION shall become effective_____.

A-27-72

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This FINAL ORDER AFTER RECONSIDERATION shall become effective_____.

Winfield Dittle

A-27-72

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809
(916) 445-1888

STATE OF CALIFORNIA

NEW CAR DEALERS POLICY AND APPEALS BOARD

In the Matter of PARK MOTORS, INC., a California corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-27-72 Filed: November 19, 1973

Time and Place of Reconsideration:	November 14, 1973, 12:30 p.m. Board Room, Port of Long Beach Administration Building 925 Harbor Plaza Long Beach, CA
For Appellant:	Harold C. Wright Brown & Wright Stanford Financial Square 2600 El Camino Real, Suite 411 Palo Alto, CA 94306
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Alan Mateer Staff Counsel

CORRECTION
FINAL ORDER AFTER RECONSIDERATION

The attached page, numbered page 5, is hereby substituted for page number 5 in the final order promulgated in the above-entitled matter. This corrects the effective date of the Final Order After Reconsideration from November 22, 1973, to November 29, 1973.

such conviction shall be considered a violation of the terms and conditions of the probation imposed herein.

If, and in the event that, the Director of Motor Vehicles shall determine, after giving appellant notice and opportunity to be heard, that a violation of probation has occurred, the director may terminate the stay and impose the revocation or otherwise modify this order. In the event that appellant faithfully keeps the terms of the conditions imposed for the period of three (3) years, the stay shall become permanent and the respondent shall be fully restored to all of its license privileges.

This FINAL ORDER AFTER RECONSIDERATION shall become effective November 29, 1973.

GILBERT D. ASHCOM — PASCAL B. DILDAY

MELECIO H. JACABAN — AUDREY B. JONES

JOHN ONESIAN — ROBERT A. SMITH

WINFIELD J. TUTTLE

11/20/73 This correction was sent to: Harold Wright - 1
Park Motors - 1
Elwyn Judd - 1
Robert C. Cozens - 1
L.L. Lauscher - 1
Alan Matier - 2
Frank Iwama - 2

All other copies corrected before mailing.
J Powell

2415 First Avenue
P. O. Box 1828
Sacramento, CA 95809

Telephone: (916) 445-1888

NEW CAR DEALERS POLICY & APPEALS BOARD

STATE OF CALIFORNIA

IMPERIAL MOTORS, a California Corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES, Respondent.	No. A-28-72 Filed: March 5, 1973

Time and Place of Hearing:	November 15, 1972, 10:15 a.m. City Council Chambers 3200 Tahquitz-McCallum Way Palm Springs, California
For Appellant:	George E. Leaver Getz, Aikens & Manning Suite 770, 5900 Wilshire Blvd. Los Angeles, CA 90036
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Alan Mateer Staff Counsel

FINAL ORDER

Imperial Motors, hereinafter referred to as "appellant", filed an appeal with this board from a decision of the Director of Motor Vehicles suspending appellant's license to operate

as a vehicle dealer for a period of 15 days and placing appellant on probation for a period of one year.

The Director of Motor Vehicles found that appellant had (1) failed in 59 instances to give to the department timely written notice after transferring an interest in certain motor vehicles; (2) failed in 44 instances to mail or deliver to the department timely reports of sale for certain used vehicles together with other documents and fees required to transfer registration of the vehicles; (3) failed in 18 instances to mail or deliver timely to the department the application for registration of certain new motor vehicles together with other documents or fees required to register the vehicles; (4) reported to the department in 13 instances a date of sale other than the true date of sale; (5) filed with the department in 6 instances false certificates of non-operation; (6) reported to the department in 5 instances a date other than the true date for the first date of operation of certain vehicles; (7) overcharged customers for vehicle license fees in 3 instances; and (8) disconnected, turned back or reset the odometer, in order to reduce the mileage thereon, on one vehicle.

With reference to the charges in excess of registration and vehicle license fees due or paid, the director found that the amounts of such overcharges were $1.00, $5.00, and

$39.00 for a total of $45.00. However, we concur with appellant's argument that the finding of a $39.00 overcharge was erroneous in that the amount overcharged was, in fact, $3.00. At the hearing before this board, counsel for each party stipulated that the facts giving rise to the finding of the $39.00 overcharge were identical with the facts before us in Miller Imports, Inc. v. Department of Motor Vehicles, A-22-72.

In Miller we held that a dealer did not violate Section 11713(g) Vehicle Code when passing on to a purchaser registration and license fees that the dealer had paid, prior to the sale, to one other than the State. At page 2 of our final order, we said:

> "We find no ambiguity in the statute [Section 11713(g) Vehicle Code] under discussion. It clearly makes unlawful the passing on to buyers costs of registration and vehicle license fees that are not due the State but it also provides for an exception; i. e., the dealer may pass on such costs when he has paid the fees prior to the sale. The exception is equally clear and there is no room for transposing a phrase as respondent [Department of Motor Vehicles] seeks to do."

Accordingly, we find that appellant overcharged its customers a total of $9.00 for registration and vehicle license fees rather than $45.00 as found by the director.

Having disposed of the only question of law raised by the appeal and noting that the facts are not in dispute, we direct our attention to the appropriateness of the discipline imposed by the director.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

The department argues that this board may not reduce the penalty unless it is excessive as a matter of law. This argument is not deserving of extended discussion. We have considered our penalty-fixing powers on a number of previous occasions (Holiday Ford v. Department of Motor Vehicles, A-1-69; Bill Ellis, Inc. v. Department of Motor Vehicles, A-2-69; Ralph's Chrysler Plymouth v. Department of Motor Vehicles, A-3-69) and have concluded that the statutes governing this board do not require that, in reviewing the penalty, we are to limit our considerations to a determination of whether or not there has been an abuse of discretion. In Bill Ellis, Inc. v. DMV, supra, we stated:

> "We are firmly of the opinion that Section 3054 V.C. empowers this board to reverse the penalty fixed by the department, without finding an abuse of discretion, and remand the case to the department for penalty redetermination or, in the alternative and in its discretion, exercise its independent judgment and amend the penalty accordingly."

This is not to say that we may freely substitute our penalty views for that of the director, willy-nilly. Obviously, the director's determination must be given respectful consideration and weight, just as the director affords such consideration and weight to the proposals of the hearing officer.

Respondent's arguments concerning our penalty-fixing powers appear to be directed at both the wisdom of the relevant statutes and their constitutionality as we

interpret them. We observe that the wisdom of a statute is the responsibility of the Legislature, not the administrative agency charged with enforcing it. (Ex parte O'Shea, 11 Cal.App. 568; Watson v. State Division of Motor Vehicles, 212 Cal. 279; Comfort v. Comfort, 17 Cal.2d 736.) Our research has uncovered no foundation for respondent's contention that the clear language of Section 3054 Vehicle Code raises "...serious constitutional issues..." The only case cited by respondent in support of its constitutional argument, Allen v. California Board of Barber Examiners, 25 Cal.App.2d 1014, is not in point.

In this case, there are a number of factors which have led us to the conclusion that requiring appellant to cease the business of buying and selling automobiles for 15 days is not commensurate with the wrongful acts committed by appellant, and that a lesser penalty of a 10-day cessation will adequately serve the public interest.

Appellant's owner, Kay Olesen, has been an automobile dealer for many years. He has had, and continues to have, two dealerships, one in Indio for 26 years and another in Cathedral City for 15 years. He had never, prior to the commencement of the proceedings in this case, received a written complaint from the Department of Motor Vehicles.

The evidence shows that repeat business has been a

mainstay of both outlets. An environment permitting unethical practices upon customers is not conducive to repeat business.

There is no evidence that appellant's owner or top management were involved in or condoned the wrongful acts. Company policy precluded odometer work, and the evidence preponderates to the view that the odometer tampering was an isolated incident engaged in by a salesman who had been discharged sometime before the odometer tampering came to light.

With reference to the untimely and false reporting to the department, the evidence shows that the culpability on the part of the owner and top management consisted of negligence in supervision. When the wrongful reporting came to the owner's attention, he took corrective action.

However, a corporate licensee is responsible for all acts of its officers, agents and employees acting in the course and scope of their employment. A contrary rule would, of course, preclude meaningful license discipline. Here, the wrongful conduct of those responsible for management was negligent supervision over a short period of time.

We note that the hearing officer, who had the opportunity to observe the demeanor and attitude of the witnesses, proposed that no actual suspension be imposed. We do not concur with his proposal. As we said in Berkey-Lee v. DMV, A-23-72:

"To impose no actual suspension on an automobile dealer who has unlawfully tampered with an odometer would, in our opinion, undermine public confidence in an industry that has made commendable strides towards achieving the dignity it deserves. Further, no actual suspension in a case of this kind would suggest to the wrongdoer, as well as other licensees who may have an inclination toward facilitating the sale of automobiles through wrongful means, that the risks involved do not outweigh the benefits."

Appellant's other violations were also of a serious nature.

In our view, a 10-day actual suspension is adequate discipline to show the need to meticulously follow the laws governing the operation of the licensed business. We, therefore, amend paragraph 2 at page 2 of the Director's Decision as follows:

2. The foregoing suspensions shall run concurrently for a total suspension of fifteen (15) days; provided, however, that five days of said 15 days are hereby stayed.

The remainder of the order is hereby affirmed.

This Final Order shall become effective March 26, 1973.

GILBERT D. ASHCOM

AUDREY B. JONES

ROBERT B. KUTZ

WINFIELD J. TUTTLE

D I S S E N T

We dissent as to the penalty fixed by the majority. In our view, the wrongful acts do not call for shutting down the dealership for 10 days. The mitigating factors recited by the majority clearly indicate that a license suspension of substantially less than 10 days is all that the facts of this case call for.

PASCAL B. DILDAY

MELECIO H. JACABAN

ROBERT A. SMITH

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Melecio H Jacaban

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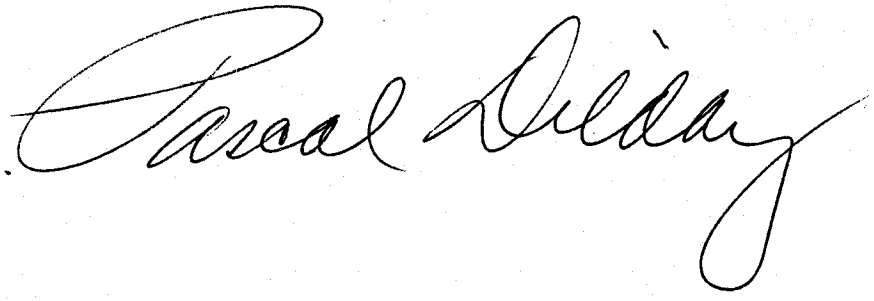

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The remainder of the order is hereby affirmed.

This Final Order shall become effective_____.

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Winfield Little

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This Final Order shall become effective_____.

Audrey B Jones

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This Final Order shall become effective _____.

Gilbert A. Ashcom

D I S S E N T

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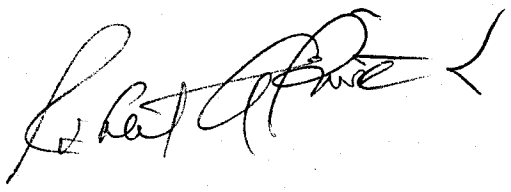

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Sacramento, CA 95809
(916) 445-1888

NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

In the Matter of MONDAY INVESTMENTS, INC., dba DON MONDAY BUICK, A California Corporation, Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Appeal No. A-29-72 Filed: March 13, 1973

Time and Place of Hearing:	February 7, 1973 - 10:30 a.m. Room 1122, State Building 107 South Broadway Los Angeles, CA
For Appellant:	DeWitt Blase Heily, Blase, Ellison & Muegenburg Attorneys at Law 220 South A Street Oxnard, CA 93030
For Respondent:	Honorable Evelle J. Younger Attorney General By: Mark Levin Deputy Attorney General

FINAL ORDER

Don Monday Buick, hereinafter referred to as "appellant", appealed to this board from a decision of the Director of Motor

Vehicles imposing a suspension of appellant's license for 30 days, with 25 days stayed for a period of three years, during which time appellant would be on probation subject to the condition that it obey all laws and all rules and regulations of the Department of Motor Vehicles pertaining to the exercise of the licensed privilege.

The case is before us on a STIPULATION IN LIEU OF ADMINISTRATIVE RECORD. Paragraph 3 of the stipulation recites as follows:

> "That on October 29, 1970, in the Superior Court, County of Ventura, State of California, Donald L. Monday entered a plea of nolo contendre to a violation of Section 182.1 of the Penal Code charging that he unlawfully agreed and conspired to violate Section 28051 of the California Vehicle Code which offense was declared to be a misdemeanor by Judge Edwin F. Beach on December 3, 1970. A copy of the minute order of the Superior Court dated December 3, 1970, is attached hereto as Exhibit "A"."

It was stipulated that the only evidence introduced at the hearing by the Department of Motor Vehicles to support its contention that grounds exist for license discipline was the judgment of conviction.

The first of the three questions presented for our consideration is:

DOES CONVICTION, UPON THE ENTRY OF A NOLO CONTENDRE PLEA TO THE CHARGE OF CONSPIRING TO DISCONNECT, TURN BACK OR RESET THE ODOMETER OF A MOTOR VEHICLE WITH THE INTENT TO REDUCE THE NUMBER OF MILES INDICATED THEREON, A VIOLATION OF SECTION 182.1 PENAL CODE, CONSTITUTE A CONVICTION WITHIN THE MEANING OF SECTION 11705 VEHICLE CODE? 1/

Appellant contends that the nolo contendre provision of Section 11703 pertains only to refusals to issue a new license and does not apply to an accusation against an existing licensee. Appellant points out that Section 11703 contains several grounds for license refusal and provides, among other things, that a conviction after a plea of nolo contendre is deemed to be a conviction within the meaning of Section 11703. Section 11705 contains a number of bases for suspension or revocation of an existing license. Section 11705 was amended in 1965 to provide: "Any of the causes specified in Section 11703 as a cause for refusal to issue a license and certificate to a transporter, manufacturer or dealer applicant, shall be cause, after notice and hearing, to suspend or refuse to renew a license and certificate to a transporter or dealer." Appellant directs our attention to the fact that Section 11705 was not amended in 1968, as was Section 11703, to add the language which provides that a conviction upon a nolo contendre plea is to be deemed a conviction within the meaning of that section. Appellant states:

1/ All sections will reference the Vehicle Code unless otherwise indicated.

"The question, therefore, becomes one of whether the 1968 added language in Section 11703 pertaining to nolo contendre pleas was incorporated into Section 11705 by virtue of the 1965 amendment to Section 11705 previously quoted." Unlike appellant, we answer this question in the affirmative.

We initially observe that the purpose of the legislative scheme for licensing vehicle dealers (Article 1, Chapter 4, Division 5, Vehicle Code) is to protect the public from "...unscrupulous and irresponsible persons in the sale of vehicles subject to registration under the code [Vehicle]..." (Merrill v. Department of Motor Vehicles, 71 Cal.2d 907.) We further observe that, "Statutes on the same subject matter must be construed together in the light of each other so as to harmonize them if possible, although they were passed at different times, and although one deals specifically and in greater detail with the subject than does the other." (45 Cal. Jur.2d 629, Statutes §121.)

As the statutes read at the relevant time, Section 11703 provided cause for license refusal and also provided that a nolo contendre plea was to be deemed a conviction within the meaning of that section. Section 11705 provided bases for license discipline. Section 11703.1 provided that bases for license discipline specified in Section 11705 were also bases for license refusal. Section 11705, subsection (d), provided

that bases for license refusal specified in Section 11703 were bases for disciplining an existing license. Thus, it is clearly apparent that the Legislature intended, insofar as possible, that acts or omissions providing a basis for license refusal would also provide basis for disciplining an existing license. Conversely, those acts or omissions providing basis for disciplining an existing license should also provide basis for license refusal.

When the Legislature amended Section 11703 in 1968 to include the nolo contendre provision, it did not make the same amendment to Section 11705 because of the cross-reference amendment of Section 11705 in 1965. Amending the latter section would have been an idle act.

We have no quarrel with appellant's assertion that greater legal safeguards are afforded one facing discipline of an existing license than one applying for a license. "The opportunity to continue in a trade or profession is more zealously guarded than the opportunity for entrance to it." (D'Amico v. Board of Medical Examiners, 29 Cal.App.3d 224.) But, as we have previously indicated, a reading of the relevant statutes abundantly demonstrates to us that the Legislature did not intend that an existing license be protected by a nolo contendre plea on the part of its holder.

Quite aside from statutory language, we can find no rational

basis for distinguishing between a license refusal and license discipline as far as a nolo contendre plea is concerned. Such a plea to a wrongful act, being sufficient to prevent one from engaging in a lawful business, should be sufficient basis for disciplining an existing license. The need for public protection from the erring licensee is certainly as great as the need for protection from one failing to meet licensing standards.

IS CONVICTION OF THE CRIME OF CONSPIRACY TO DISCONNECT, TURN BACK OR RESET AN ODOMETER WITH THE INTENT TO REDUCE THE MILEAGE INDICATED THEREON, CONVICTION OF A CRIME INVOLVING MORAL TURPITUDE?

We are not dealing in the abstract in answering this question as appellant would urge. Here we have a conviction of a licensee of this state, privileged to buy and sell motor vehicles from and to members of the public, a position of trust and confidence.

Don Monday, appellant's president, pled nolo contendre to the charge of conspiring to violate Section 28051.[2/] No evidence of other wrongdoing was introduced by the department to support its charge that appellant had been guilty of acts or omissions constituting grounds for license discipline. However, there is other evidence before us, namely that appellant is a licensed vehicle dealer engaged in the business of retail sale of

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2/ Section 28051: "It is unlawful for any person to disconnect, turn back, or reset the odometer of any motor vehicle with the intent to reduce the number of miles indicated on the odometer gauge."

automobiles to the public.

Appellant argues that a conspiracy to tamper with an odometer, standing alone, is not necessarily a crime involving moral turpitude. Appellant concedes that such a conspiracy could involve moral turpitude but contends that facts beyond a conviction upon nolo contendre plea must be shown in order to support a finding of moral turpitude.

The cases are legion in pronouncing the rule that moral turpitude is "everything done contrary to justice, honesty, modesty or good morals." (In re McAllister, 14 Cal.2d 606; Bryant v. State Bar of California, 21 Cal.2d 295; Stanford v. State Bar of California, 15 Cal.2d 721; Wallace v. State Bar, 21 Cal.2d 322; Otash v. Bureau of Private Investigators, 230 Cal.App.2d 568; In re Hallinan, 43 Cal.2d 243.) Hallinan holds that an attorney could be ". . . summarily disbarred . . . without giving him further notice or hearing . . . " only when he is convicted of a crime ". . . the commission of which would in every case evidence a bad moral character . . ." and that an attorney cannot be summarily disbarred after conviction of a crime "...the minimum elements of which do not involve moral turpitude..." because to hold otherwise would deprive him of ever having "...an opportunity to be heard on the issue on which his disbarment depends." We are not faced with that

question here, of course, because appellant has been heard. He failed to produce any evidence tending to dispel the inference of moral turpitude which arose from the evidence. In 48 Cal.2d 52, after being afforded an opportunity to be heard, Hallinan was suspended from practice for three years because of his conviction of income tax fraud.

If an offense involves moral turpitude, the same stigma attaches to a conspiracy having that offense as its object. (6 Cal.Jur.2d Rev. 239, Attorneys at Law §156.)

We believe that the evidence in the administrative record is sufficient to support an inference that a licensed automobile dealer who entered into an unlawful agreement with another to reduce the number of miles registered on the odometer did so intending to deceive prospective automobile buyers and, therefore, committed an offense involving moral turpitude.

An inference is, "A deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evidence Code 600(b).) An inference must be a reasonable deduction from the facts proved. (Braycovich's Estate, 153 Cal.App.2d 505; Cothran v. Town Council of Los Gatos, 209 Cal.App.2d 647.)

We believe it is more likely true than not that a licensed automobile dealer would not unlawfully enter into an agreement to tamper with an odometer unless he thought such

an act would increase the current value of a vehicle or facilitate its sale. Misrepresenting the odometer reading to a prospective customer, or agreeing to a scheme to do so is clearly contrary to honesty and good morals. There may be situations wherein a person could violate Section 28051 without tainting himself with moral turpitude. But where, as here, the person is a licensed dealer, subject to license discipline for violation of Section 28051 (as provided in subsection (n) of Section 11713 and subsection (g) of Section 11705), pleads no contest to this criminal charge, we believe that he unlawfully conspired to tamper with the odometer with the purpose of misrepresenting the mileage on the vehicle to a prospective purchaser.

Perhaps, conflicting inferences could be drawn from the facts presented by the stipulation. The Director of Motor Vehicles inferred that the agreement entered into by appellant's president constituted a crime involving moral turpitude. We believe such inference to be supported by the evidence and consistent with human experience and reason. We now direct our attention to the last issue raised by this appeal.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

We have voiced on numerous occasions our opinion that: "The manipulation of an odometer for the purpose of reducing

the mileage indicated thereon is one of the most serious wrongs that a licensee or non-licensee can commit in the sale of an automobile." (Rich Motor Company v. Department of Motor Vehicles, A-16-71; Zar Motors v. Department of Motor Vehicles, A-17-71; Chase Nesse Auto, Inc. v. Department of Motor Vehicles, A-18-71.) In Zar we pointed out that odometer tampering deceives automobile purchasers and tarnishes the image of all motor vehicle dealers, including those who do not resort to such fraudulent conduct, and gives the dishonest dealer an unfair business advantage over the ethical dealer in a business that is highly competitive. In Chase Nesse Auto, we pointed out that turning back the odometer on vehicles still covered by the manufacturer's warranty perpetrates a fraud upon the warrantor.

To add to what we have said, we point to an expression of Congress on the matter of odometer manipulation. In Section 401 of the "Motor Vehicle Information and Cost Savings Act", it is recited:

> "The Congress hereby finds that purchasers, when buying motor vehicles, rely heavily on the odometer reading as an index of the condition and value of such vehicle; that purchasers are entitled to rely on the odometer reading as an accurate reflection of the mileage actually traveled by the vehicle; that an accurate indication of the mileage traveled by a motor vehicle assists the purchaser in determining its safety and reliability; and that motor vehicles move in the current of interstate and foreign commerce or affect such commerce. It is therefore the purpose of this title to prohibit tampering with odometers on motor vehicles and to establish certain safeguards for the protection of purchasers with respect to the sale of motor vehicles having altered or reset odometers."

In view of the effort of the people of this state and nation, as evidenced by the enactments of their elected representatives, to eliminate the odious practice of odometer tampering, one wonders how an automobile dealer engaging in such conduct can expect the state to permit him to continue in motor vehicle commerce.

The penalty imposed by the Director of Motor Vehicles is commensurate with the facts of the case, including those stipulated to by the parties going to mitigation of penalty, and, therefore, we affirm the Director's Decision in its entirety.

This Final Order shall become effective March 29, 1973.

GILBERT D. ASHCOM

PASCAL B. DILDAY

AUDREY B. JONES

ROBERT B. KUTZ

JOHN ONESIAN

ROBERT A. SMITH

WINFIELD J. TUTTLE

A-29-72

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Gilbert D. Ashoom

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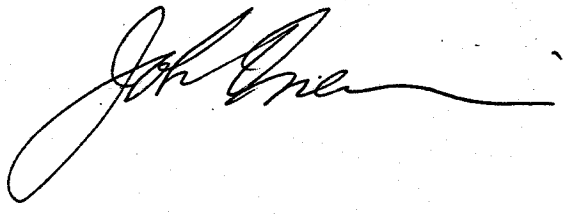

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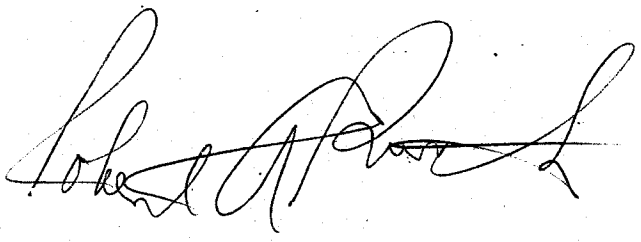

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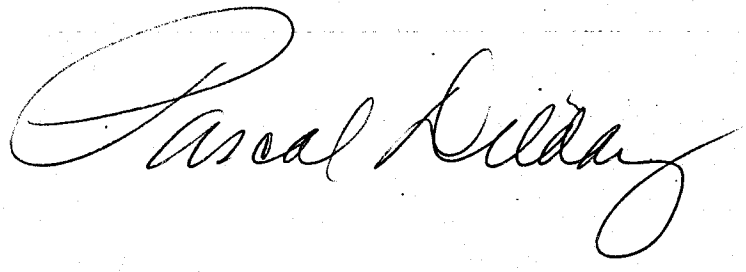

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Robert B. Kutz

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Winfield J. Little

A-29-72

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(916) 445-1888

NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

In the Matter of ROBERT E. SYKES, dba FAMILY FUN-MOBILIVEN, Appellant, v. DEPARTMENT OF MOTOR VEHICLES Respondent.	Appeal No. A-30-72 Filed: September 27, 1972

Time and Place of Hearing:	September 13, 1972, 2:30 p.m. Director's Conference Room Department of Motor Vehicles 2415 First Avenue Sacramento, CA 95809
For Appellant:	Robert L. Mezzetti Mezzetti & Testa 300 South First Street, Suite 210 San Jose, CA 95113
For Respondent:	Honorable Evelle J. Younger Attorney General By: John E. Barsell Deputy Attorney General

FINAL ORDER

On August 24, 1972, Robert E. Sykes, dba Family Fun-Mobiliven, filed an appeal with this board from an action of the department taken on August 9, 1972 rejecting and

returning to the appellant an application filed with the department by appellant for a new car dealer license, and also rejecting and returning to appellant fees in the sum of $91.00. The department's action, which was taken in the form of a letter to appellant from staff counsel of the department, was a declaration that the application could not be entertained because appellant had filed an earlier application which was then pending on an appeal to this board. Having read the administrative record, considered the points and authorities submitted by the appellant and the oral arguments of both parties, the matter having been submitted to the board for decision, the board makes the following findings, conclusions and order.

I

Respondent proceeded in a manner contrary to law when, on August 9, 1972, it refused to process appellant's application for a vehicle dealer's license, submitted to respondent on July 7, 1972, and returned to appellant that application and the fees which had also been submitted.

II

Respondent, by a letter under date of August 24, 1972, to appellant, informed appellant that the department was prepared to process the application of July 7, 1972, and requested appellant to "resubmit" the application.

III

Respondent is hereby directed to accept and process the application of July 7, 1972, providing the application and

requisite fees are resubmitted to the department within 10 days after this final order is filed. Respondent is further directed to proceed with its investigation under Section 11704 Vehicle Code as expeditiously as is practicable. The application, when resubmitted with appropriate fees as herein specified, shall be deemed filed on the date it was originally filed, namely, July 7, 1972, and the 120 day time limitation contained in subsection (d) of Section 11704 Vehicle Code shall commence as of July 7, 1972.

IV

This order shall be effective when served on the parties.

AUDREY B. JONES

GILBERT D. ASHCOM

ROBERT B. KUTZ

MELECIO H. JACABAN

W. H. "H" McBRIDE

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A-30-72

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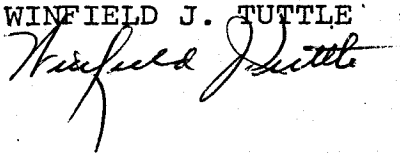

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NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

In the Matter of POMONA VALLEY DATSUN, INC., Appellant, v. DEPARTMENT OF MOTOR VEHICLES, Respondent.	Appeal No. A-31-72 Filed: March 16, 1973

Time and Place of Hearing: February 7, 1973, 1:30 p.m.
Room 1122, State Building
107 South Broadway
Los Angeles, California

For Appellant: Ronald E. Pettis
Attorney at Law
Hennigan, Butterwick & Clepper
4000 Tenth Street
Riverside, CA 92501

For Respondent: R. R. Rauschert
Legal Adviser
By: Alan Mateer
Staff Counsel
Department of Motor Vehicles
2415 First Avenue
Sacramento, CA 95818

FINAL ORDER

Pomona Valley Datsun, Inc., hereinafter referred to as "appellant", appealed to this board from a decision of the Director of Motor Vehicles suspending for a period of 30 days

the dealer's license to buy and sell automobiles. Execution of the 30-day suspension was stayed in its entirety and appellant was placed on probation to the Department of Motor Vehicles for two years during which time appellant is to obey all the laws of the State of California and all rules and regulations of the Department of Motor Vehicles governing the exercise of appellant's privileges as a licensee.

Proceeding via the Administrative Procedure Act (Section 11500 et seq.Government Code), the Director found that appellant: (1) failed in 7 instances to give written notice to the department before the end of the third business day after transferring an interest in certain vehicles, thereby violating Section 5901 Vehicle Code;[1/] (2) failed in 8 instances to mail or deliver to the department the reports of sale, together with other documents and fees, required to register certain vehicles within the 20-day period allowed by law, thereby violating Section 4456 and Section 5753; (3) failed in 5 instances to mail or deliver to the department the reports of sale, together with other documents and fees,required to register certain vehicles within the 30-day period allowed by law, thereby violating Section 4456 and Section 5753; and (4) included as an added cost to the selling price of 22 vehicles additional fees in excess of the fees due and paid to the state,

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1/ All references are to the Vehicle Code unless otherwise indicated.

thereby violating Section 11713(g).

The Director further found that appellant refunded the additional registration fees to the customers after the investigation by the department.

Appellant's appeal notice and opening brief raise issues concerning the absence of any finding by the department of wrongful intent on the part of the dealer and the appropriateness of the penalty. In oral argument before this board, appellant's attack upon the decision of the Director of Motor Vehicles followed a course dissimilar from that reflected in the notice or brief.

As we understand the thrust of appellant's oral argument concerning untimely notices of sale and untimely reports of sale, it calls into question the appropriateness of the manner in which the department determines, for finding violations of Section 5901 and Section 4456, the date of sale of a vehicle. Regarding the finding that appellant overcharged customers vehicle license fees, appellant's argument is three-fold: one, there was actually an underpayment to the department rather than an overcharge to the customers; two, the department did not prove the correct amount of fees; and, three, appellant actually reimbursed the overcharged customers by crediting the customers' accounts at the dealership with the amount of the overcharge. We turn first to the issues raised in oral argument and conclude with the issues raised in opening brief.

MAY THE DEPARTMENT RELY ON THE DATE OF SALE ENTERED BY THE DEALER ON THE NOTICE OF SALE AND REPORT OF SALE FOR DETERMINING THE UNTIMELINESS OF THE SUBMISSION OF THOSE DOCUMENTS TO THE DEPARTMENT?

Appellant points to Section 5901 and correctly states that the sale of a motor vehicle occurs when the purchaser passes consideration to the seller and takes physical possession or delivery of the vehicle. Appellant argues that this statutory definition should control the date of sale rather than the date entered by the dealer and next argues that the department, in relying upon the date of sale entered by the dealer, is creating an unauthorized presumption of the correctness of that date.

In our view, it is entirely proper for the department to rely on the date of sale entered by the dealer on the notice of sale and report of sale. The entry by the dealer of a certain date of sale creates a permissible inference that such date is the true date of sale. "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Section 600(b) Evidence Code.) Is it not logical and reasonable to deduce that a licensed automobile dealer would avoid subjecting himself to both criminal and administrative sanctions (filing a false document - Section 20) by submitting to his licensor correct information on a document that the law requires? We firmly believe that such a deduction is permissible.

We have failed to find in the administrative record sufficient evidence to dispel the inference that the date of sale entered by appellant was the actual date of sale. At one point, counsel for appellant suggested via cross-examination of a departmental witness that the delivery date of a vehicle (Item No. 4) was later than the date of sale shown on the notice of sale. However, the witness had no personal knowledge of either the date of sale or the actual date of delivery (R.T. 5:7-15) and the matter was not pursued. If the true date of sale was other than that shown on the documents submitted by the dealer, facts in support thereof should have been brought forth by appellant at the administrative hearing.

DID THE DIRECTOR ERR IN FINDING THAT APPELLANT INCLUDED AS AN ADDED COST TO THE SELLING PRICE OF A VEHICLE, AN AMOUNT FOR LICENSING OR TRANSFER OF TITLE OF THE VEHICLE, WHICH AMOUNT WAS NOT DUE THE STATE, THEREBY VIOLATING SECTION 11713(g)?

According to appellant, its salesman, when selling a vehicle, included the cost of dealer installed accessories in the license fee computation but when the deal came to the "front office", the license fees were recalculated and the employee so doing, following instructions from the department during 1969 or 1970, used only the base price of the car as fixed by the manufacturer. The amount of fees as recalculated was sent to the department and, because the cost of dealer-installed accessories were not included in the computation, appellant contends that the department was "...probably underpaid

two or three dollars in many cases, rather than the customer being overcharged." (R.T. 15:28 to R.T. 17:22.) Appellant conceded that it had collected more for vehicle license fees than was forwarded to the department. (R.T. 19:4-7.)

The evidence is confusing as to what formula the dealer's staff used for computing vehicle license fees but, the underpayment theory is not supported by the record. Appellant's only attempt to substantiate the underpayment theory was with reference to the Herron vehicle. (R.T. 28:18 to R.T. 29:14.) The market value of that vehicle for license fee purposes was computed at $2,073.72. Appellant also showed that the selling price was $2,140.90. Thus, the market value entered on the document submitted to the department was actually $65.18 less than the cost of the vehicle to the buyer. These facts fail to support appellant's underpayment theory because the buyer's cost has no relevancy in computing license fees (Section 10753 Revenue and Taxation Code). Appellant, not having shown the correct market value for license fee purposes, failed to show that the Herron transaction resulted in an underpayment.

Appellant complains that the department did not prove its case in that it did not prove the correct amount of license fees due in each instance. Appellant's complaint is ill-founded. The department introduced into evidence, without objection, copies of the master file reference copy of the certificate of ownership in each instance wherein a charge of excessive

license fees was made. These records reflected the amount of the license fee as computed by the department and appellant attempted no rebuttal of this evidence. If the department erred, the facts required to show error were readily available to appellant.

Appellant next argues that any amounts collected from customers and not submitted to the department were returned by crediting the customer's account. This argument has no bearing on whether or not Section 11713(g) has been violated. It goes only to the issue of penalty; discussion thereof will be postponed until we reach the penalty phase.

As previously indicated, in opening brief appellant contends "...that in addition to the findings of certain violations of the Vehicle Code Sections 4456, 5753, 5901 and 11713(g), that some finding of fraud or wrongful intent in dealing with the public is required before a dealer's license, certificate, and special plates can be suspended pursuant to Vehicle Code Section 11705..." As authority for this proposition, appellant cites Merrill v. Department of Motor Vehicles, 71 Cal. 2d 907, and recites language of the court pointing out that the statutory scheme governing the licensing of dealers has as its primary concern, "...that the public be protected from unscrupulous and irresponsible persons in the sale of vehicles subject to registration under the code."

We rejected this argument in Diener Motors v. Department of Motor Vehicles, A-15-71. We said: "...we do not believe the Merrill case either requires or authorizes us to consider the

dealer's character, reputation or state of mind when deciding whether there was or was not a violation of Section 11713(g) Vehicle Code." We continue to hold that the Merrill case merely precludes the department from imposing upon an applicant for a dealer's license standards of conduct, or other requirements, not related to the applicant's honesty, fair dealing and freedom from deceit under the requirement that the applicant be a "bona fide" dealer and that the holding in the Merrill case has no bearing whatever on the proper interpretation of Section 11713(g).

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH HIS FINDINGS?

Appellant characterizes the stayed 30-day suspended sentence and two years' probation as an "abuse of discretion" on the part of the Director of Motor Vehicles. We reject this characterization in its entirety.

An abuse of discretion is the exercise of discretion exceeding the bounds of reason, all circumstances before it being considered, or its exercise to an end or purpose not justified by and clearly against reason. (Schaub's Inc. v. Department of Alcoholic Beverage Control, 153 Cal.App.2d 858; Primm v. Primm, 46 Cal. 690.) Where reasonable men may differ over the appropriateness of an administrative penalty, there can be no abuse of discretion. (Manjares v. Newton, 64 Cal.2d 365; Delta Rent-a-Car Systems v. City of Beverly

Hills, 1 Cal.App.3d 784; Johnston et al. v. Rapp, 103 Cal.App. 2d 202; Harris v. Alcoholic Beverage Control Appeals Board, 62 Cal.2d 589). Where, as here, there are a substantial number of violations of the law governing the conduct of the licensed business, some involving the handling of funds belonging to others than the licensee, and the administrative sanction does not require, in the absence of further wrongful conduct, a cessation of the licensed business, reasonable men would not all agree that the penalty was too severe.

Our rejection of appellant's "abuse of discretion" argument does not, however, dispose of the penalty issue. As we pointed out in Bill Ellis Ford v. Department of Motor Vehicles, A-2-69, and followed in subsequent cases, the Legislature did not intend that this board be bound by the "abuse of discretion" rule. We, therefore, are required to review the facts of the case and, in the exercise of our independent judgment, determine whether or not the penalty fixed by the director is commensurate with such facts.

We have on numerous occasions emphasized the importance of meeting the time requirements fixed by statute for filing certain documents with the department (Bill Ellis Ford v. DMV, supra; Fletcher Chevrolet, Inc. v. DMV, A-4-69; Coberly Ford v. DMV, A-25-72). In Coberly, we reviewed the legislative history of the statutory scheme for recordation of interest in motor vehicles

and pointed out the potential for harm to the public from untimely reporting to the department of transfers of interests in motor vehicles. We said commencing at page 6:

> "The potential for buyer frustration, inconvenience and legal entanglement, both criminal and civil, that may arise from delinquent reporting to the Department of Motor Vehicles on the part of dealers is too obvious to require elaboration. Having a highly mobile, expensive and readily marketable item of property with no indicia of ownership other than mere possession is simply incompatible with sound business practices. The Legislature and the Department of Motor Vehicles, the administrative agency vested with the duty of registering vehicles (14,444,245 vehicles in 1971) have taken steps to provide a workable means of recording interests in vehicles and enforcing such requirements."

Furthermore, we added:

> "When one considers the several hazards a dealer exposes his business to, to say nothing of the welfare of his customers, when he fails to meet departmental reporting requirements, one wonders how a dealer can regard such requirements other than as the most important aspect of his business operation."

We are cognizant of the fact that appellant sent two of its office staff, Cheryl Codner and Lorraine Frick, to a training program for the purpose of educating them in the calculating of license fees. The training was for a period of eight weeks and appellant paid the costs. Commendable as this may be, obviously the desired result was not achieved. The course commenced during February 1971 and the sales giving rise to the finding of overcharges of license fees occurred from February 13, 1971 to and including June 23, 1971. The training failed to remove the differences concerning calculation of license fees that existed between the persons attending the

course and Martin Sparks, an employee of appellant who processed "DMV work" at the time the overcharges occurred. Sparks continued to handle the work in a manner that he felt was correct although his method differed from that taught Codner and Frick. (R.T. 31:19 to R.T. 32:7).

Any misinformation Sparks may have received from his contacts with the department could have been dispelled had there been proper follow-up by the dealership when Codner and Frick completed the course. Notwithstanding the fact that two persons from the dealership attended the course for the purpose of learning license fee computation, Sparks was left responsible for calculating such fees until one of the employees that attended the course was assigned this responsibility several months after the course was completed (R.T. 40:18-23). Furthermore, the knowledge gained by Codner and Frick apparently was not passed on to the sales staff (R.T. 43:15-17).

These and other facts cause us to believe that appellant's president did not, as he testified, "...do everything humanly possible" to properly instruct and train employees. He did not check the Registration Manual issued by the department when he found a difference of opinion existing among employees concerning the calculation of fees (R.T. 51:16-19). He did not read the instructions in the Dealer's Handbook, a booklet issued by the department for the convenience of dealers, concerning the calculation of fees (R.T. 52:2-5). It becomes

abundantly clear that appellant's president viewed casually the dealership's responsibility to the department and to customers, as far as calculating license fees is concerned.

We believe a reasonably prudent businessman would have been more cognizant of and more concerned over the hazards involved in deviations from statutory requirements concerning the conduct of his licensed business and, to avoid such hazards, would have made sure that the knowledge gained by those attending the school was passed on to others in need of such knowledge. This was not done but, under the penalty imposed by the director and affirmed by us, appellant has the opportunity to remedy any defects that may still exist in its procedures. The penalty does not require the dealership to shut its doors providing its officers, agents and employees obey all laws and regulations governing the licensed business. This certainly cannot be said to impose an unreasonable or additional burden.

It should go without saying that crediting a customer's account by a debtor-dealer without immediately paying the customer-creditor the amount of the credit is a far cry from making a prompt refund of the amount admittedly due the customer as evidenced by the credit to the customer's account on the debtor-dealer's books. Proof of prompt refund of a mistaken overcharge may be entitled to great weight as evidence

in mitigation of violation of Section 11713(g). Raising a credit on the debtor-dealer's books, without notification to the customer, is merely an admission of knowledge by the dealer of the violation. It is questionable whether this evidence places the licensee in a better or worse position than the licensee who has overcharged but whose books do not show that the overcharge was known to the licensee. Certainly the admission is absent in the latter situation.

Also, it should be apparent to dealers that some customers may never return to their doors. In any event, having violated the law by overcharging the customer, the licensee has absolutely no right to continue to use the overcharged amount in its business on the assumption the customer may return to the licensee for service or goods to offset the debt. The licensee must, upon discovering its erroneous overcharge, take immediate steps to refund the money it unlawfully extracted from its customer if it hopes to show mitigation in regard to penalty. (Any language to the contrary in Ralph Williams Ford v. Department of Motor Vehicles, A-5-69, is hereby disapproved.) Appellant's showing in this regard is lacking.

We observe, further, that if data furnished by the department, or language in the statutes, creates ambiguity as to the amount of fees due, the licensee should establish a trust

account of the funds involved, separate from its own funds, and promptly advise both the customer and the department of its action and the reasons therefor. Appellant advised no one of its position in this regard until a review of the dealership's operation by the department. We further note that Sparks testified: "Well, once, several years ago at a meeting, they [Department of Motor Vehicles] made it clear that it was our duty to return the money to the customers." (R.T. 38:26-28.)

The money collected from the customer belongs to either the state or the customer, not the licensee, and the licensee, once aware of any ambiguity or conflict, has no right to convert the money to its own use as the proof here indicates was the case.

The decision of the Director of Motor Vehicles is hereby affirmed in its entirety.

This Final Order shall become effective March 30, 1973.

GILBERT D. ASHCOM

PASCAL B. DILDAY

AUDREY B. JONES

ROBERT B. KUTZ

JOHN ONESIAN

ROBERT A. SMITH

WINFIELD J. TUTTLE

A-31-72

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Winfield J. Tuttle

A-31-72

2415 First Avenue
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NEW CAR DEALERS POLICY & APPEALS BOARD

STATE OF CALIFORNIA

WILLIAMS CHEVROLET, INC., a California corporation, Appellant,	Appeal No. A-32-72
vs.	Filed: April 26, 1973
DEPARTMENT OF MOTOR VEHICLES, Respondent.	

Time and Place of Hearing:	March 14, 1973, 10:45 a.m. Room 1122, State Building 107 South Broadway Los Angeles, CA
For Appellant:	B. W. Minsky Attorney at Law Minsky, Garber & Rudof Suite 810, Wm. Fox Building 608 South Hill Street Los Angeles, CA 90014
For Respondent:	R. R. Rauschert Legal Adviser Department of Motor Vehicles 2415 First Avenue Sacramento, CA 95818 By: Richard E. Lehmann Staff Counsel

ORDER

Williams Chevrolet, Inc., hereinafter "appellant", appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor Vehicles following

proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles found that appellant had: (1) failed in two instances to submit to the department written notice of the transfer of interests in certain vehicles before the end of the third business day after transferring such interest; (2) failed in 26 instances to timely file with the department reports of sale and other documents and fees required to transfer registration of certain used vehicles; (3) failed in 11 instances to timely file with the department reports of sale and other documents and fees required to register certain new vehicles; (4) made a false statement in the application for registration of one vehicle by reporting to the department a date of sale other than the true date of sale and, with reference to the same vehicle, filed with the department a false certificate of non-operation; (5) reported to the department in one instance a date other than the true date for the first date of operation of a vehicle, thereby making a false statement in the application for registration; (6) overcharged customers for license fees in two instances; (7) represented in two instances that vehicles were new when, in fact, they were used; (8) filed with the department in two instances false powers of attorney in connection with transferring an interest in certain vehicles; (9) assisted customers in four instances

in obtaining side-loans without reflecting the loan transaction in the conditional sale contracts; (10) in 23 instances delivered vehicles, pursuant to a conditional sale contract, which did not contain in a single document all of the agreements of the buyer and the seller with respect to the total cost or terms of payment of the vehicles; (11) delivered a vehicle to a customer in one instance, pursuant to a conditional sale contract, without delivering to the buyer a copy of such contract; (12) failed in two instances to give the buyers a copy of the credit application which the buyers had signed during contract negotiations; (13) in one instance, delivered a vehicle to a customer, pursuant to a conditional sale contract, wherein the contract recited a cash down-payment of a certain number of dollars when, in fact, a portion of that amount was in the form of a post-dated check; and (14) repossessed in three instances motor vehicles pending the execution of a conditional sale contract without returning the down payments to the prospective purchasers at or near the time of repossession.

Facts of a mitigating nature found by the director are: (1) the false date of first operation finding arose from an unusual situation wherein the customer actually became the purchaser of record of three different automobiles; (2) refunds for excess license fees were ultimately made, although well

beyond the time that the overcharges were known to appellant; (3) some resolution was reached with the buyer in one instance concerning the representation of a used vehicle as new and, with the other, appellant offered to replace the vehicle with a new one; (4) the failure of appellant to deliver to the buyer a copy of the contract of sale appeared to be an employee's oversight; (5) appellant's president has made certain changes in the dealership's operation such as employing a new general manager and instructing him to abide by all departmental requirements; and (6) appellant sells many vehicles.

The penalty imposed by the Director of Motor Vehicles revokes the corporate license but the revocation is stayed for a period of six months in order to permit stockholders to transfer their stock to a person or persons acceptable to the Department of Motor Vehicles. The order further permits the director to extend the six-month period to twelve months in order to achieve the transfer of stock if the director determines that the stockholders are making good faith attempts to effect such transfer.

Appellant raises two questions of law which must be disposed of before turning our attention to the substantive findings of the Director of Motor Vehicles.

DID THE HEARING OFFICER COMMIT ERROR BY DENYING APPELLANT'S MOTION TO BE RELIEVED OF DEFAULT FOR FAILURE TO TIMELY FILE DEMAND FOR CROSS-EXAMINATION OF THE DEPARTMENT'S WITNESSES?

Section 11514 Government Code authorizes any party to a proceeding conducted via the Administrative Procedure Act (Sections 11500 et seq. Government Code) to produce evidence by way of affidavit providing that party serves upon his opponent, anytime 10 or more days prior to hearing or a continued hearing, a copy of the affidavit. A notice must accompany the affidavit informing the opponent that the affidavit will be introduced into evidence. The notice must further state that the affiant will not be called to testify orally and that the opponent will not be entitled to question the affiant unless a request for cross-examination is made to the proponent of the affidavit within seven days after service of it upon the opponent. If such request for cross-examination is not timely made, the right to cross-examine the affiant is waived and the affidavit, if introduced into evidence, is to be given the same effect as if the affiant had testified orally.

The record before us shows that the department placed in the United States mail, on September 4, 1970, the Notice of Defense, Statement to Respondent and Accusation addressed to appellant. The Notice of Defense was signed by appellant's

president, George Williams, dated September 14, 1970, and requested that all correspondence concerning the matter be sent to a named law firm. It was filed by the department September 17, 1970.

On September 15, 1970, the department mailed to appellant, not the designated law firm, a Notice of Affidavits and Declaration, Affidavits and Declaration which met Section 11514 Government Code requirements and informed appellant that a request for cross-examination of affiants, to be effective, must be mailed or delivered to the department on or before September 28, 1970. It is apparent that the department placed in the mail the affidavits and accompanying documents two days before it received directions from appellant as to where future correspondence should be sent.

On November 13, 1970, counsel for appellant, B. W. Minsky, filed with the department a Demand For Cross-Examination. This demand was rejected by the department.

The relevant statute, Section 11514 Government Code, does not require the department to withhold forwarding the affidavits to the accused until such time as the Notice of Defense has been received by the department. The only time requirement concerning service of the affidavits and accompanying notice upon the opponent is that they be served 10 days or more prior to the hearing or a continuation of a

hearing. There is no contention that this was not done.

The untimely request for cross-examination was properly rejected and it follows that no error was committed by the refusal to grant appellant relief from default.

Before passing from this issue, we observe that the rejection of appellant's demand for cross-examination did not operate as a complete bar to appellant's opportunity to examine the affiants at the hearing. As indicated in the department's letter of November 30, 1970, to appellant's counsel, the department offered to furnish appellant with whatever subpoenas it required.

WAS THE EVIDENCE SUFFICIENT TO SUPPORT A FINDING OF NON-COOPERATION ON THE PART OF APPELLANT?

Appellant calls into question the evidentiary basis for that portion of Paragraph XVIII of the Proposed Decision, subsequently adopted by the Director of Motor Vehicles, which reads as follows:

> "Respondent [appellant] does sell many vehicles. The total sales volume over the three-year period preceding the filing of the accusation amounted to something over 8,000. It is respondent's [appellant's] position that the number of violations uncovered are quite small in relation to the total sales volume. This point, however, is rejected because respondent [appellant] has not fully cooperated with employees of the Department and, in fact, respondent's [appellant's] president has hampered the investigation."

Appellant asserts that the finding of non-cooperation constituted error because the evidence used to support it was

introduced for the sole purpose of impeaching the testimony of appellant's president, George Williams. According to appellant, the department then proceeded to create from this restricted evidence an inference that a larger number of violations would have been found had there been full cooperation from appellant and its employees. The department did not charge appellant with non-cooperation or obstructing an orderly review of appellant's operation and, accordingly, did not determine that disciplinary action should flow from such conduct. However, the degree of cooperation or lack thereof is relevant for determining appropriate discipline for the findings pertaining to the charges filed. The evidence in question not only tends to impeach by contradiction the testimony of Williams but also tends to rebut appellant's theory that its violations are small in comparison to total sales volume. Further, it raises an inference that more violations would have been discovered by the department in the absence of obstructive tactics. (cf. Ford v. New Car Dealers Policy and Appeals Board, 30 Cal.App.3d 494, 106 C.R. 340.)

Appellant argues that the 54 violations found to be true should be considered in light of 8,211 transactions, according to the testimony of appellant's president, during 1968 through 1970. (R.T. 17:1-2.) On appeal, appellant characterizes as its "strongest point . . . the small amount of violations

to the total sales volume." (App.Cl.Br. 6:15-19.) The response appears to be two-fold. One, the total number of violations would have been greater had there been full cooperation with departmental investigators. Two, the period of review was intended to cover a 90-day period beginning February 25, 1970, and that this period was curtailed because of appellant's lack of cooperation and its obstructive tactics. (Resp.Op.Br. 4:12-20.) With regard to the latter contention, we find that the review by the department covered a period, at least for some charges, of about 37 months. While the department may have planned on searching for some types of violations occurring during a 90-day period only, other aspects of the review covered a much longer period. Exhibit A, attached to the accusation, shows that the review covered the sale of vehicles from May 8, 1968 (Item 37) to June 12, 1971 (Item 47).

Appellant attacks the assertion of the department that more violations would have been discovered had appellant cooperated on the grounds that the evidence used to support the finding of non-cooperation with the investigators was limited by the hearing officer to impeachment purposes only and, thus, could not properly be used to support such a finding. The record shows the hearing officer ruled that the testimony of Robert W. Edmonson, a senior special investigator for the

department, would be admitted for impeachment purposes only. This witness testified as to some obstructive tactics on the part of appellant's president and appellant's counsel made a motion to strike the testimony on the grounds that it was outside the scope of the accusation. (R.T. 245:10-17.) After the hearing officer indicated his concern over the nature of the testimony, counsel for the department responded:

> "I submit, your Honor, the purpose for bringing this up -- Mr. Williams has testified as to his cooperation in furnishing the records for this investigation, and he has previously indicated that he is a large-volume dealer. There has been an indication that this is a relatively small number of violations being charged and I feel we can properly show why there is a small number of violations being charged, and Mr. Williams in his testimony on his cooperation is not entirely truthful." (R.T. 245:24 to R.T. 246:3.)

Counsel for the department then stated that the evidence was being offered primarily as impeachment of the testimony of Williams and the hearing officer declared that the evidence would be admitted "For the limited purpose only of impeachment --" (R.T. 246:8-13.)

Evidence that tends to impeach is introduced for the purpose of discrediting other evidence. "Impeach", as used with reference to the law of evidence, means to discredit. (People v. Shannon, 147 Cal.App.2d 300, 305 P.2d 101; Baxter v. Rodgers, 191 Cal.App.2d 358, 12 C.R. 635.) Impeaching evidence may be considered for only a limited purpose, namely, testing the credibility of a witness and it must be discarded for any

other purpose except one not germane to this case. (Moffatt v. Lewis, et al., 123 Cal.App. 207, 11 P.2d 397.) Evidence that has been offered specifically for a limited purpose must be confined in its effect to the purpose expressed at the time it is offered. (Baxter v. Rodgers, supra.)

The testimony of Edmonson as to the conduct of Williams during the former's presence at the licensed premises can be used only to lessen the degree of credit to be given the testimony of Williams and cannot give rise to an inference that more violations would have been discovered but for the conduct of Williams. Disbelief of a witness's testimony does not create affirmative evidence to the contrary of that which is discarded. (Lubin v. Lubin, 144 Cal.App.2d 781, 302 P.2d 49.)

If Edmonson's testimony was the sole evidence of non-cooperation, we would concur with appellant's position that the quoted portion of Finding XVIII is without evidentiary support. However, appellant overlooks the fact that there is other evidence in the case which supports that portion of Finding XVIII objected to by appellant.

The testimony of Williams provides sufficient basis for an inference of non-cooperation. Although Williams testified that he made the records avilable to the investigators, he did not take the steps to assist the investigators that a cooperative dealer would have taken. According to his

testimony, documents on incompleted transactions are not kept in the "jackets" but are kept in an "open file, in the unwind section." It is "...a different file altogether." These records were not made avilable to the investigators but, according to Williams, would have been had the investigators made a request to see them. But, Williams conceded under direct examination that departmental investigators had no way of knowing that the documents on incompleted transactions were kept in a separate location. (R.T. 224:18 to R.T. 225:13.) The testimony of a departmental investigator, Robert Pence, confirms that the investigators had no way of knowing that documents on incompleted transactions were separated from documents on completed sales. (R.T. 240:26-28.)

Furthermore, according to the testimony of appellant's president, although he was at the dealership most of the time the review was underway and conversed with the investigators, he did not take the trouble to inquire of them what violations had been discovered. (R.T. 225:25 to R.T. 226:11.) One desiring to cooperate with the state agency responsible for license supervision would have, in our view, discussed with the investigators the results of their findings and solicited from the investigators assistance in correcting procedures leading to violations that had been discovered.

There is before us other evidence in support of that portion of Paragraph XVIII under discussion. When Pence

arrived at the dealership, Williams "...informed us that his clerks were very busy and that we could see the records; however, he was not going to offer his clerks to get us any of the records -- that we were going to have to look for these records on our own." Williams showed the investigators the location of the file cabinets but Pence could not recall that Williams indicated to the investigators the location of the documents on transactions that had not been completed. (R.T. 240:17-25.) As previously indicated, Pence was not aware that these documents were kept separate from others. Williams not only did not give the investigators permission to ask appellant's clerks for information but "...he made a comment to the clerks that they weren't to answer any questions or to do any talking to us, or assist us in any way." (R.T. 241:1-5.)

Counsel for appellant made no objection to any of the questions asked Pence nor did he make a motion to strike any of the testimony of the witness. Counsel cross-examined Pence but not with reference to the non-cooperation issue.

Following cross-examination of Pence, Edmonson was called as a witness for the department. As discussed previously, his testimony was limited to impeachment of the testimony of Williams.

Appellant's motion to strike the testimony of Edmonson could in no way affect the testimony of Pence. The Pence testimony

came in unencumbered by an objection, motion to strike or declaration by the hearing officer or counsel for the department as to its purpose. A motion to strike must be made timely, otherwise, the right to make it will be deemed waived. (Starkweather v. Dawson, 14 Cal.App. 666, 112 P. 736.) The opposing party by cross-examination waives his right to move to strike those answers. (King v. Haney, 46 Cal. 560.) A party waives any objection to evidence by failure to object or move to strike. (Ortese v. Pacific State Properties, Inc., 96 Cal.App.2d 34, 215 P.2d 514; People v. Glass, 127 Cal.App.2d 751, 274 P.2d 430.)

We hold that the findings contained in Paragraph XVIII are supported by the evidence and that it is appropriate for the director to consider those findings when fixing penalty.

We now turn our attention to the substantive findings of the Director of Motor Vehicles.

ARE THE SUBSTANTIVE FINDINGS SUPPORTED BY THE WEIGHT OF THE EVIDENCE?

Appellant does not challenge the facts found by the director except those in Finding XI (false powers of attorney) and Finding XV (failure to deliver to a customer a copy of the credit application that the customer signed).

The finding that appellant filed with the department false powers of attorney in conjunction with the transfer of an interest in an automobile arose from the sale of a vehicle to Mr. and Mrs. Lawrence Booth. The evidence produced by the department consisted of an affidavit of Lawrence L. Booth (Exhibit 51) and another of his wife, Lois M. Booth (Exhibit 52). Among other things, Mr. Booth attested, "That is not my signature on the power of attorney." Mrs. Booth, among other things, attested, "I did not sign the power of attorney dated October 18, 1969."

Williams testified that he was not aware of anybody executing a false or forged power of attorney. (R.T. 201:5-7.) On cross-examination, Williams was unable to identify the signature of the witness to the powers of attorney. (R.T. 202:2-4.)

On appeal, appellant emphasized that it was not and is not the policy of appellant to forge powers of attorney and that, had appellant the opportunity to cross-examine the Booths, they would have remembered executing the documents.

We find the evidence preponderates to the view that false powers of attorney were filed by appellant with the department with reference to the Booth transaction. Accordingly, we affirm Finding XI.

Referring to the finding that appellant delivered two vehicles to customers pursuant to conditional sale contracts without delivering to the customers copies of the credit

applications which the customers had signed during contract negotiations, we hold that the weight of the evidence does not support this finding. The evidence shows that it was not the policy of the dealership to have customers sign credit applications. Charles Jereb, appellant's credit manager, testified to this effect (R.T. 88:14-26) and the testimony of Williams supports that of Jereb's. (R.T. 181:28 to 182:8.) Arellenes and Goosev submitted affidavits (Exhibits 39 and 64 respectively) attesting that a credit application was completed and signed. They did not receive a copy thereof. However, buyers sign a number of papers when purchasing a vehicle, particularly where, as here, a trade-in is involved and it would not be unusual for the purchaser to be unable to identify, after the transaction, the exact nature of the documents signed. The memory of neither of these purchasers was tested on cross-examination and no credit application was submitted into evidence to show that Arellenes and Goosev had signed the same.

We find that neither Arellenes nor Goosev signed a credit application. Accordingly, there was no obligation on the part of the dealership to deliver to either of these purchasers a copy of any credit application that may have been filled out by them or on their behalf. Finding XV of the Director of Motor Vehicles is reversed.

All other findings of fact are affirmed.

DID THE IMPOSITION OF DISCIPLINARY ACTION FOR ITEMS 10 AND 24 OF FINDING XII CONSTITUTE ERROR OF LAW?

Item 10 of Finding XII arose from the sale of a vehicle to Charles Barnett. The department's evidence, in the form of an affidavit (Exhibit 20) from Barnett as well as his testimony at the hearing, was that Barnett purchased a vehicle from appellant and signed a contract before taking possession thereof. Barnett was told a side-loan would be needed to finance the vehicle. Appellant arranged for the loan from an independent finance company. It was obtained two or three days after Barnett took possession of the vehicle.

A copy of the contract signed by Barnett and the appellant was received into evidence as the Department's Exhibit 21. It is dated February 15, 1970; calls for a lump sum payment on some unspecified date during February of 1970 and shows no indication of a side-loan.

Under cross-examination, it was confirmed that no side-loan had been obtained by Barnett at the time the contract of February 15, 1970, had been signed. (R.T. 39:28 to R.T. 40:2.) Appellant introduced into evidence, as its Exhibit D, a copy of another conditional sale contract entered into between appellant and Barnett. It was dated March 11, 1970, and shows the terms of a side-loan.

The department contends the failure of the appellant

to reflect the terms of the side-loan in the first contract constitutes a violation of Section 2982.5 Civil Code. We do not agree with this contention. That section, in relevant part, states:

> "(b) Nothing in this chapter shall be deemed to prohibit the seller's assisting the buyer in obtaining a loan upon any security from any third party to be used as a part or all of the down payment or any other payment on a conditional sale contract or purchase order; provided that the conditional sale contract sets forth on its face the amount of the loan, the finance charge, the total thereof, the number of installments scheduled to repay the loan and the amount of each such installment, that the buyer may be required to pledge security for the loan . . ."

Our disagreement with the department's position is based upon the fact that (1) no side-loan was in existence at the time the first contract was signed and (2) the terms of the side-loan were properly reflected in the second contract. We do not believe Section 2982.5 Civil Code contemplates the incorporation into the contract of sale the terms of a loan that had not been negotiated at the time the contract for the sale of the vehicle was signed. Accordingly, we reverse the determination of the Director of Motor Vehicles that the finding concerning Item 10 in Paragraph XII of his decision constitutes grounds for disciplinary action.

We do not agree that Item 24 of Finding XII constitutes grounds for license discipline. The facts found by the

director are as follows:

> "In connection with that purchase of a vehicle described as Item 24, the failure to set forth a side loan did occur when this individual purchased three separate automobiles. In attempting to purchase the second of the three vehicles, this customer borrowed $400. Thereafter, the second car was turned back and the customer purchased the vehicle described as Item 24. A further side loan was necessary in order to complete this third purchase. The second loan was, in fact, shown on the contract, but the first loan of $400 was not so shown, even though the customer received credit for this sum and was, of course, required to pay the $400 in due course."

There is no language in Section 2982.5 Civil Code which suggests that the Legislature intended that a side-loan, obtained to purchase a vehicle that is subsequently traded for a second vehicle financed under a conditional sale contract with another side-loan, should be reflected in the contract for the sale of the second vehicle with the side-loan for that second vehicle. Whatever obligations attached to the financing of the first vehicle should not be recorded in a contract which sets forth the financial obligations arising from the purchase of the second vehicle. These purchases are separate and distinct transactions and the fact that the first vehicle becomes a part of the down payment of the second makes them no less separate and distinct. The first vehicle is not in any way security for the first side-loan. The mere fact that the first vehicle is made a part of the down payment on the second vehicle does not tie the first side-loan to the

purchase of the second vehicle.

We are cognizant of the fact that the Automobile Sales Finance Act (Section 2981 et seq. Civil Code) is basically a disclosure provision. Its purpose is to protect the automobile purchaser from excessive charges by requiring full disclosure of all items of cost. (Carter v. Seaboard Finance Company, 33 Cal.2d 564, 203 P.2d 758; Ryan v. Mike-Ron Corp., 226 Cal.App.2d 71, 37 C.R. 794.) But, in so protecting the purchaser, it does not go so far as to require the same side-loan be twice disclosed. We reverse the determination that the finding concerning Item 24 in Paragraph XII of the decision constitutes grounds for disciplinary action.

DID THE IMPOSITION OF DISCIPLINARY ACTION FOR FINDING XVI CONSTITUTE ERROR OF LAW?

The director found that appellant violated Section 2982(a)(2) Civil Code by not reflecting in a conditional sale contract the true means used by the buyer to make the down payment on a vehicle. Appellant delivered a vehicle pursuant to a conditional sale contract which recited a cash down payment of $300 when, in fact, only $100 of that amount was cash. The remaining $200 was in the form of a postdated check.

Appellant does not dispute the facts but argues that they do not provide a basis for imposition of penalty. In Highway

Trailer of California, Inc., v. Frankel, 250 Cal.App.2d 733, 58 C.R. 883, the plaintiff-seller was denied recovery under a conditional sale contract for the purchase of two trailers on the grounds that plaintiff-seller had failed to comply with Section 2982 Civil Code; to wit, a postdated check had been designated for down payment purposes as "cash". The Highway Trailer court found Bratta v. Caruso, 16 Cal.App.2d 661, 333 P.2d 807, to be in point. That case held that the conditional sale contract did not conform to the requirements of Section 2982 because the vehicle dealer designated a promissory note as cash for down payment purposes. These cases are controlling and, therefore, Finding XVI is hereby affirmed.

IS THERE LEGAL SIGNIFICANCE TO THAT PORTION OF FINDING XVII RECITING THAT APPELLANT REPOSSESSED VEHICLES WITHOUT FIRST ADVISING THE PURCHASER?

Paragraph XVIII of the accusation alleges:

> "That Respondent [Appellant] repossessed a motor vehicle described as Item 40 in Exhibit A, attached hereto and by this reference made a part hereof, pending the execution of a conditional sales contract without returning the buyers down payment thereby violating Civil Code Section 2982.7 incorporated by reference in Vehicle Code Section 11705."

The department subsequently filed an amended accusation which among other things, added Items 43 and 46 to Paragraph XVIII.

Finding XVII pertains to the above allegation which, in relevant part, reads as follows:

> "Respondent [Appellant] repossessed those motor vehicles described as Item 40, in Exhibit A, attached to the accusation herein, and Items 43 and 46 described in Exhibit A, attached to the amendment of the accusation herein. The repossession was made without first advising the prospective purchasers and pending the execution of a conditional sales contract. In each of these three instances, the down payment was not returned to the prospective purchasers at or near the time of the repossession." (Emphasis added.)

It is true that the repossessions were made without first advising the prospective purchasers but, as conceded by counsel for the department during oral argument, there was no requirement at the time these repossessions occurred that the secured party notify the debtor the collateral was about to be repossessed. The phraseology "...without first advising the prospective purchasers and..." is mere surplusage.

Two basic purposes of findings by an administrative agency are to enable the reviewing tribunal to examine the decision of the agency in order to determine whether it is based on proper principles and to inform the parties the reason for the administrative action as an aid to them in deciding whether additional proceedings should be intiated and, if so, upon what grounds (Swars v. Council of City of Vallejo, 33 Cal.2d 867, 206 P.2d 355). Neither this board nor appellant can ascertain from the record whether the finding that no notification was given prior to repossession was taken

into consideration when penalty was determined. If it was taken into consideration, prejudice to the appellant may have resulted. We, therefore, direct that the language "...without first advising the prospective purchasers and..." be striken from Finding XVII.

PENALTY

Having found error of law with reference to Items 10 and 24 of Paragraph XII of the Director's Decision, insufficient evidence to support Paragraph XV of the Director's Decision and being unable to determine whether the surplusage in Finding XVII of the Director's Decision constitutes prejudicial error, we hereby remand the matter to the department, pursuant to Section 3056 Vehicle Code, for refixing of penalty not inconsistent with this Order.

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WINFIELD J. TUTTLE

A-32-72

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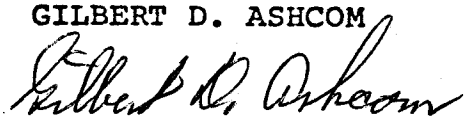
A-32-72

D I S S E N T

We dissent. We would affirm the Decision of the Director of Motor Vehicles in its entirety.

GILBERT D. ASHCOM



MELECIO H. JACABAN

A-32-72

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GILBERT D. ASHCOM

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A-32-72

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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of WILLIAMS CHEVROLET, INC., A California corporation, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-32-72(2) Filed: September 5, 1973

Time and Place of Hearing:	August 8, 1973 - 11:00 a.m. Auditorium, DMV 2570 - 24th Street Sacramento, CA 95818
For Appellant:	B. W. Minsky Attorney at Law Minsky, Garber & Rudof Suite 810, Wm. Fox Building 608 South Hill Street Los Angeles, CA 90014
For Respondent:	R. R. Rauschert, Legal Adviser Department of Motor Vehicles By: Richard E. Lehmann Staff Counsel

FINAL ORDER

Williams Chevrolet, Inc., "appellant", appealed to this board from an "Order Refixing Penalty" by the Director of Motor Vehicles.

This matter is before us on appeal for a second time after a full review of the case on its merits and in which all issues of law and fact raised by the former appeal were fully considered and duly disposed of. See our order in the case of Williams Chevrolet, Inc., vs. Department of Motor Vehicles, Appeal No. A-32-72, filed April 26, 1973.

In that order, having found error of law with reference to Items 10 and 24 of Paragraph XII of the Director's Decision, insufficient evidence to support Paragraph XV of the Director's Decision and, being unable to determine whether the surplus language which we directed stricken from Finding XVII was considered by the director to the prejudice of appellant in determining the penalty, we remanded the matter to the director pursuant to Section 3056 Vehicle Code for refixing of penalty not inconsistent with our order.

Pursuant to the mandate of this board and duly considering our action, the director, on May 10, 1973, promulgated his "Order Refixing Penalty" which imposes the same penalty as contained in his previous order of October 24, 1972, and provides for revocation of the corporate license with a stay for a period of six months in order to permit the stockholders

to transfer their stock to a person or persons acceptable to the Department of Motor Vehicles. The order further permits the director to extend the six-month period for an additional six months, if in his discretion the director determines that a good faith offer is being made to effect a transfer of the stock, but such transfer has not yet been achieved.

The present appeal is predicated on the contention that, in the circumstances of this case, the penalty ordered is "extremely harsh" and that "it is tantamount to a final revocation". We pause at this point to observe that the department in argument before the board in this appeal concurred with appellant's position that the penalty of the director is, in fact, an order revoking the corporate license and that the stay is merely to provide time for liquidation of the dealership.

In support of its present contention, appellant argues, in essence, that most of the violations occurred in the latter part of 1969 and early in 1970; that prior thereto, it had never been the subject of any disciplinary proceedings; that its activities were neither flagrant nor intentional; that most of the items arose because of oversight and employee errors; and that many of the violations were "somewhat technical" in nature. Appellant further argues

that it should be given the opportunity of proving it can operate within the laws and regulations of the State of California and the Department of Motor Vehicles in the operation of its business, having demonstrated its ability to do so in the last two years. Inferentially, appellant alludes to error by the director in the "Order Refixing Penalty" as it provides for the same penalty imposed prior to the board's remand. Appellant in his brief also argues that it is an abuse of discretion by an administrative agency, such as the department, to invoke the maximum penalty of revocation of a license on a first offense (citing Magit vs. Board of Medical Examiners, 57 Cal.2d 74-87; O'Reilly vs. Board of Medical Examiners, 66 Cal.2d 381-389; Bonham vs. McConnell, 45 Cal.2d 304; and Cooper v. State Board of Medical Examiners, 35 Cal.2d 24, P.2d 630).

We will first address the latter two areas of concern raised by the appellant before discussing the appropriateness of the penalty.

To dispel any inference that the director did not comply with the mandate of the board because there was no resultant change in penalty, we need only look to the language of the "Order Refixing Penalty". In his order, the director, after setting forth with specificity each of the board's actions with respect to the findings reversed or modified, states, "I have reevaluated the penalty in the light of these changes..."

This language indicates without equivocation that the director complied with the mandate of the board, pursuant to Section 3050 Vehicle Code, and duly reconsidered the penalty. The fact that the director found the penalty previously imposed nonetheless commensurate with the findings as affirmed by the board and refixed the penalty without change in no way disparages this conclusion.

Any contention by appellant, direct or indirect, that the director failed either to carry out the board's mandate or fully exercise his sound discretion in refixing the penalty is completely devoid of merit.

We turn next to appellant's contention to the effect that revocation of a license for a first offense is an abuse of discretion. In the case of Magit vs. Board of Medical Examiners supra, cited by appellant, the court reversed a decision revoking the license of a doctor. There the court found an abuse of discretion under special mitigating circumstances which existed in that particular case. We find no language in the decision which in any way supports the general proposition, as appellant would have it, that it is an abuse of discretion to invoke the maximum penalty of revocation of a license for a first offense. The other cases cited by appellant, supra, are also inapplicable. All involve remands for reconsideration of penalty where

error was found to have existed in each case with regard to part of the findings. For the reasons stated, we find this assertion of error to be without merit.

The remaining question and the major issue raised by this appeal is whether the penalty is commensurate with the findings. We hold absolutely no disagreement with the appropriateness of the order revoking the corporate license for the violations found to have been committed by the appellant. However, we are moved to modify the order by providing for a period of probation because of attendant circumstances.

The factor which we find most persuasive in our determination is the argument of the appellant that it has continued in business as a new car dealer licensed by the department for a period in excess of two years since the filing of the accusation in this case. This fact is supported by the records before us and no information of any derelictions whatever by appellant during this time has been brought to our attention.

Additionally, we have considered the mitigation as found by the director with particular cognizance attached to the fact that appellant's president has made certain changes in the operation of the dealership and has employed a new general manager.

In our view, appellant, having taken corrective action and having demonstrated its capability to operate, apparently without committing further violations, over the last two years, has created a reasonable expectation that it can and will in the future comply with all the requirements of the law. Consequently, we consider probation to be appropriate. This will permit the appellant to continue its business on condition that it obey all laws of the State of California and the regulations of the Department of Motor Vehicles governing its exercise of the privileges as a licensee. Should it not do so, the Director of Motor Vehicles may, after giving appellant notice and opportunity to be heard, take appropriate action to terminate the probation and revoke the corporate license.

Pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the Decision of the Director of Motor Vehicles as follows:

WHEREFORE, the following order is hereby made:

The Vehicle Dealer's License, certificate and special plates (D-6975) heretofore issued to Williams Chevrolet, Inc., a California corporation, are hereby revoked; provided, however, that execution of said order of revocation is hereby stayed for a period of three (3) years and appellant is placed on probation for a period of three (3) years upon the following terms and conditions:

Appellant and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered as a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the revocation; or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the three (3) year period, the stay shall become permanent and appellant's license shall be fully restored.

This Final Order shall become effective September 17, 1973 .

PASCAL B. DILDAY

W. H. "HAL" McBRIDE

JOHN ONESIAN

ROBERT A. SMITH

D I S S E N T

We would affirm the penalty of the director in its entirety.

Licensing legislation is intended to protect the public by removing either temporarily or permanently, from the licensed business, licensees whose methods of conducting business indicate a lack of those qualities which the law demands.

Appellant has clearly and unequivocally demonstrated his lack of competency and integrity to continue as a licensed dealer. We view revocation of appellant's corporate license under the terms and conditions set forth in the decision of the director as entirely appropriate and commensurate with the findings.

GILBERT D. ASHCOM

MELECIO H. JACABAN

WINFIELD J. TUTTLE

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A-32-72(2)

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In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the revocation; or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the three (3) year period, the stay shall become permanent and appellant's license shall be fully restored.

This Final Order shall become effective_____.

PASCAL B. DILDAY

W. H. "HAL" McBRIDE

JOHN ONESIAN

ROBERT A. SMITH

A-32-72(2)

D I S S E N T

We would affirm the penalty of the director in its entirety.

Licensing legislation is intended to protect the public by removing either temporarily or permanently, from the licensed business, licensees whose methods of conducting business indicate a lack of those qualities which the law demands.

Appellant has clearly and unequivocally demonstrated his lack of competency and integrity to continue as a licensed dealer. We view revocation of appellant's corporate license under the terms and conditions set forth in the decision of the director as entirely appropriate and commensurate with the findings.

GILBERT D. ASHCOM

MELECIO H. JACABAN

WINFIELD J. TUTTLE

A-32-72(2)

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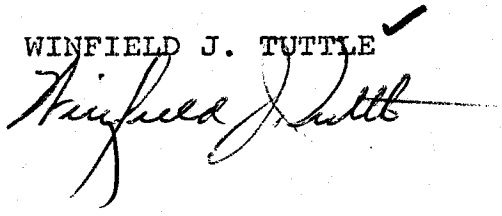

A-32-72(2)

P. O. Box 1828
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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of DON LEE THIEL, dba THIEL MOTORS, Appellant, v. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-33-72 FILED: November 23, 1973

Time and Place of Hearing:	October 10, 1973, 10:30 a.m. 2570 - 24th St., Room 200A Sacramento, CA 95818
For the Appellant:	Harold C. Wright Attorney at Law Brown, Wright & Kucera 2600 El Camino Real, Suite 411 Palo Alto, CA 94306
For the Respondent:	Honorable Evelle J. Younger Attorney General By: Joel S. Primes Deputy Attorney General

FINAL ORDER

Don Lee Thiel, dba Thiel Motors, hereinafter referred to as "appellant", appealed to this board from a disciplinary action taken against the corporate license by the Department of Motor Vehicles following proceedings pursuant to Section 11500 et seq. Government Code.

The Director of Motor Vehicles, adopting the Proposed Decision of the Hearing Officer, found that: (1) appellant had during April 1971 advertised Datsun pickups available at $2,098; that three persons sought to buy stripped-down Datsuns during that month but were unable to do so; that each, however, bought Datsuns with accessories; that appellant knew of the advertisement and knew that the vehicles, as advertised, would not be sold at the advertised price; that appellant, through his agents, refused to sell at the advertised price in April 1971 and his reason for not doing so was immaterial; (2) appellant failed in 21 instances to give written notice to the department within three days after transfer of vehicles; (3) appellant failed in 12 instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 40 days; (4) appellant failed in 34 instances to mail or deliver reports of sale of vehicles (with documents and fees) to the department within 20 days; (5) appellant failed in one instance to mail or deliver reports of sale for vehicle (with documents and fees) to the department within 10 days; and (6) appellant in six instances charged purchasers of vehicles excessive registration fees.

Additional findings were made in pertinent part as follows: appellant, now 33 years of age, has been a motor vehicle dealer in the Modesto area for 13 years; he has

a sizeable business, grossing $2,500,000 in 1971 and employing 35 employees and salesmen; in 1971 appellant sold 1,250 vehicles and his 1972 rate is about the same; evidence concerning timely reporting requirements and payment of fees fairly established that the appellant was negligent in this phase of the operation; appellant's business had been looked over by department investigators in late 1970; numerous instances were found where fee refunds were due purchasers; refund checks were made out but many were not mailed by appellant; instances of fee overcharges indicate appellant was lax in mailing refunds to purchasers.

The penalty imposed by the director was as follows: for false or misleading advertising, 15 days' suspension; for failure to give 3-day notices, 5 days' suspension; for failure to file reports of sale within 20 days, 5 days' suspension; for failure to file reports of sale within 40 days, 5 days' suspension; for failure to file report of sale within 10 days, 5 days' suspension; and for charging excessive registration fees, 5 days' suspension.

It was provided that the 15-day suspension for false or misleading advertising was to run consecutively with all other suspension, while other suspensions were to run concurrently, for a total period of suspension of 20 days.

Essentially this appeal is based on the contentions that the findings are not supported by the weight of the

evidence, the decision is not supported by the findings and that the penalty is not commensurate with the findings. The appeal is limited to the three areas in which the issues were decided adversely to the appellant; i. e., false or misleading advertising, late transfers and overcharge of fees.

Appellant further raises an ancillary issue contending that the hearing officer originally proposed a suspension of 15 days which the director modified to 20 days (by increasing the penalty for false or misleading advertising from 10 to 15 days) without complying with Government Code Section 11517 (b) and (c). From our examination of the record, we are entirely satisfied that appellant's contention is entirely devoid of merit. However, no useful purpose would be served by extended discussion of this issue as it is rendered moot by our decision with respect to the finding of false or misleading advertising.

Section 3054, subsection (d), Vehicle Code, requires us to use the independent judgment rule when reviewing the evidence. Pursuant to this rule, we are called upon to resolve conflicts in the evidence in our own minds, draw such inferences as we believe to be reasonable and make our own determination regarding the credibility of witnesses' testimony in the transcript of the administrative proceedings (Park Motors, Inc. v. Department of Motor Vehicles, A-27-72; Holiday Ford v. Department of Motor Vehicles, A-1-69; and Weber and Cooper v. Department of

Motor Vehicles, A-20-71.)

Applying the weight of the evidence rule, we find insufficient support for the Director's Finding IV (false or misleading advertising).

Our concern with the lack of evidence preponderating in favor of the department is grounded in several areas; first, the ambiguity inherent in the advertisement when related to the evidence and the controlling law; second, the paucity of evidence establishing the knowledge or intent requisite to a finding of a violation of Section 11713(a) Vehicle Code; and, third, the comparatively weak and conflicting posture of the probative evidence establishing the false or misleading nature of the advertisement.

The sections of the Vehicle Code which deal with false or misleading advertising (Secs. 11713(a) and (b)) essentially proscribe two courses of conduct. (1) Making any untrue or misleading statements about a vehicle or making such statements as part of an intentional plan or scheme not to sell a vehicle at the advertised price; and (2) advertising for sale a vehicle not on the premises or available to the dealer from the manufacturer or distributor. The advertisement involved read as follows: "'71 Datsun Pickups Now Available. $2098. Thiel Motors. 608 10th St. 524-6304."

The ambiguity which concerns us arises from the use of the words "Now Available" appearing in the advertisement. These

words could reasonably be interpreted as conveying the representation that such vehicles were physically present at the dealer's premises, that the dealer was regularly receiving them from the factory or distributor and could make delivery within an acceptable time or that, on order, they were "available" in that they could be obtained from the factory or distributor. Considering this in light of the evidence, it was established without contradiction that, during April 1971, appellant at times was receiving shipments of these specific vehicles from the factory or distributor. Thus, when viewed against the controlling law, the advertisement was not in contravention of either Section (a) or (b) of 11713 V.C. with regard to availability.

The problem of ambiguity of the advertisement is further compounded by the absence therein of any language whatever with respect to accessories. Consequently, to hold that the advertisement in effect offered '71 Datsun pickups for sale "stripped" (i.e., without accessories) is to resort to speculation, which we will not do. The appellant advertised the price of pickups as $2098, and the evidence amply supports the fact that such vehicles were sold at that price during April 1971, albeit accessories were additional.

The crux of the department's contention, as found established by the director, is that during April 1971 appellant knew of the advertisement but refused to sell the vehicles "stripped" and at the advertised price. The department predicated its case

on the advertisement which appeared in the Modesto Bee on April 2, 27 and 28, 1971. It was established, however, that the same 3-line advertisement appeared not only on these dates but on every day of publication of the paper from December 1, 1970, through July 30, 1971, and was inserted in this manner to obtain a favorable daily advertising rate. It was additionally established that during the entire running of the advertisement, except during April 1971, approximately 26 Datsun pickups were sold, some at $2098 and other at a lesser figure and some that sold at $2098 included accessories such as radios or bumpers. Confirming that such sales were made, appellant on his own behalf testified that if a customer did not want accessories, he could purchase or order a pickup "stripped". Considering all of this in light of our previous discussion, we are not satisfied that the appellant possessed the guilty knowledge or intent as part of a scheme or plan within the contemplation of Section 11713(a) Vehicle Code.

We next turn to the evidentiary posture of the case with particular attention to the findings of the director that, "Three persons in April 1971 sought to buy 'stripped down' Datsuns from respondent for $2098. Each was unable to purchase a vehicle as requested." The three persons referred to were the three witnesses called by the department to establish the false or misleading nature of the advertisement. These were

Mr. Alton, Mr. Jordan and Mrs. Harvey.

Although Mr. Alton testified that he was informed by a salesman that he had to buy an air conditioner or camper shell in order to purchase a vehicle that was then in stock, he also testified that the same salesman told him he could get a "stripped" model, if he "would just wait a little while" at the price of $2098. Mr. Alton also admitted that at the time he first considered buying a pickup, he wanted a radio and wrap-around bumper.

As to Mr. Jordan, at the time he visited appellant's premises, he advised the salesman he would like to have a pickup "just as it comes", which meant to convey "without bumper". At that time, all they had was a demonstrator. Subsequently he was called by the salesman who informed him that a purchaser had backed out of a sale and that a pickup was available but that it was equipped with a bumper and radio. Mr. Jordan replied, "Fine, that's all right. I will take it." Prior to making the purchase, he had had no discussion with anyone at Thiel Motors as to whether or not he had to purchase extra equipment.

Lastly, as to Mrs. Harvey, she and her son went to Thiel Motors to buy a pickup with as few accessories as they could. They didn't want a radio or bumper. Although she was told she would have to buy an air conditioner, radio and bumper to

get one of the pickups on the lot, she did not ask if she could order one without accessories. They paid $2098 for the pickup plus the additional cost of the accessories.

Of significance is the fact that none of the three witnesses went to Thiel Motors in response to the advertisement although Mr. Alton and Mrs. Harvey subsequently read it. It is evident that none of the witnesses were misled by the advertisement; none requested to place an order for a "stripped" vehicle; Mr. Alton was told he could get one if he waited a little while; the sale price of the pickup, without accessories, was $2098; and both Mr. Alton and Mr. Jordan were completely satisfied with buying a radio and bumper.

In our view of the sum total of the evidence, there is a lack of evidentiary support for a finding that appellant advertised falsely or in a manner to mislead the public.

Accordingly, Findings of Fact IV and Determination of Issues II are reversed. The remaining findings of fact and determination of issues are affirmed.

Pursuant to Sections 3054(f) and 3055 Vehicle Code, the New Car Dealers Policy and Appeals Board amends the Decision of the Director of Motor Vehicles as follows:

WHEREFORE, the following order is hereby made:

The vehicle dealer's license, certificate and special plates (D-5022 and MC-904) heretofore issued to appellant,

Don Lee Thiel, dba Thiel Motors, are suspended for a period of five (5) days, with three (3) days of the suspension stayed for a period of one year during which time appellant's license, certificate and special plates shall be placed on probation to the Director of Motor Vehicles upon the following terms and conditions:

Appellant, and its officers, directors and stockholders shall comply with the laws of the United States, the State of California and its political subdivisions, and with the rules and regulations of the Department of Motor Vehicles.

If appellant, or any of appellant's officers, directors or stockholders, is convicted of a crime, including a conviction after a plea of nolo contendere, such conviction shall be considered a violation of the terms and conditions of probation.

In the event appellant shall violate any of the terms and conditions above set forth during the period of the stay, then the Director of Motor Vehicles, after providing appellant due notice and an opportunity to be heard, may set aside the stay and impose the stayed portion of the suspension, or take such other action as the director deems just and reasonable in his discretion. In the event appellant does comply with the terms and conditions above set forth, then at the end of the one-year period, the stay shall become permanent and appellant's license fully restored.

This Final Order shall become effective December 10, 1973.

PASCAL B. DILDAY

JOHN ONESIAN

THOMAS KALLAY

ROBERT A. SMITH

AUDREY B. JONES

MELECIO H. JACABAN

W. H. "Hal" McBRIDE

WINFIELD J. TUTTLE

A-33-72

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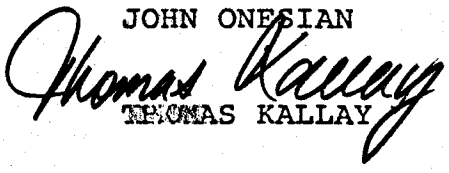

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A-33-72

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STATE OF CALIFORNIA

NEW CAR DEALERS POLICY & APPEALS BOARD

In the Matter of DON LEE THIEL, dba THIEL MOTORS, Appellant, vs. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent.	Appeal No. A-33-72 FILED: November 30, 1973

Time and Place of Hearing:	October 10, 1973, 10:30 a.m. 2570 - 24th St., Room 200A Sacramento, CA 95818
For the Appellant:	Harold C. Wright Attorney at Law Brown, Wright & Kucera 2600 El Camino Real, Suite 4 Palo Alto, CA 94306
For the Respondent:	Honorable Evelle J. Younger Attorney General By: Joel S. Primes Deputy Attorney General

CORRECTION OF FINAL ORDER

The Final Order of the New Car Dealers Policy and Appeals Board filed in the above-entitled case November 23, 1973, is hereby corrected:

On page one, the word "corporate" is deleted and the word "dealer's" is substituted therefor.

The following language is deleted from page 10:

"...and its officers, directors and stockholders..." and "...or any of the appellant's officers, directors or stockholders...".

PASCAL B. DILDAY	AUDREY B. JONES
JOHN ONESIAN	MELECIO H. JACABAN
THOMAS KALLAY	W. H. "HAL" McBRIDE
ROBERT A. SMITH	WINFIELD J. TUTTLE